Supreme Court, U.S.
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No.

In the Supreme Court of the United States

KAY BARNES, IN HER OFFICIAL CAPACITY AS MEMBER OF THE BOARD OF POLICE COMMISSIONERS OF KANSAS CITY, MISSOURI, ET AL.,

Petitioners,

v.

JEFFREY GORMAN,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), prohibits disability-based discrimination in any public program or activity receiving federal funds. Section 202 of the Americans with Disabilities Act, 42 U.S.C. § 12132, more generally prohibits disability-based discrimination in any public program, activity or service regardless of the receipt of federal funds. The question presented in this case is:

Whether the Eighth Circuit, in agreement with the Fourth Circuit but in conflict with the Third and Sixth Circuits, correctly held that punitive damages may be awarded against a municipal government in an implied private cause of action brought under Section 504 of the Rehabilitation Act or Section 202 of the ADA.

RULE 14.1(b) STATEMENT

Pursuant to Rule 14.1(b), petitioner Kay Barnes states that the other parties in the court of appeals were the following defendants named in their official capacities as members of the Board of Police Commissioners of Kansas City, Missouri: Dr. Stacey Daniels-Young, Jeffrey J. Simon, Joseph J. Mulvihill and Dennis C. Eckhold. Although the Eighth Circuit's caption also lists as defendants Richard Easley, in his official capacity as Chief of Police of the Kansas City, Missouri Police Department, and Neil Becker, in his official capacity as a member of the Kansas City Police Department, both were in fact dismissed from the case by the trial court prior to the entry of judgment. See note 4, *infra*. In this Court, the petitioners in addition to Commissioner Barnes are Commissioner Daniels-Young, Commissioner Eckhold, and Commissioner Karl Zobrist (who has succeeded to the office previously held by Jeffrey J. Simon, see S. Ct. Rule 35.3), all in their official capacities. Commissioner Mulvihill resigned from the Board of Police Commissioners effective on May 26, 2001; his successor has not yet been named, but will become a petitioner once he or she takes office. S. Ct. Rule 35.3.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 257 F.3d 738. The order denying rehearing en banc (Bowman and Loken, JJ., dissenting) and panel rehearing (App., *infra*, 52a) is unreported. A previous opinion of the court of appeals (*id.* at 35a-51a) is reported at 152 F.3d 907. The opinion of the district court vacating the punitive damages award (App., *infra*, 21a-32a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 2001, and rehearing was denied on August 20, 2001 (App., *infra*, 52a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, the Civil Rights Act of 1991, Title VI of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972, all as amended, are set forth at App., *infra*, 53a-56a.

STATEMENT

This long-running case arises out of the 1992 arrest of a patron of a Kansas City nightclub who got into an altercation with a bar employee, was forcibly ejected from the bar, and then, once outside the bar, refused to honor a request to leave made by several off-duty police officers serving as security guards. After being placed under arrest for trespassing, the patron, who is paraplegic and confined to a wheelchair, was transported to the police station in a van that was equipped with a bench. Despite precautions taken to secure the patron in an upright position, he fell from the bench during the trip after he loosened his seatbelt and another belt that had been used to secure him somehow came undone. On the basis of injuries allegedly sustained in the fall, the patron – respondent Jeffrey

Gorman – sued several members of the Kansas City police department and Board of Police Commissioners, alleging violations of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), and Section 202 of the Americans with Disabilities Act, 42 U.S.C. § 12132.

The jury awarded Gorman more than a $1 million in compensatory damages as well as punitive damages of $1.2 million. Although the district court vacated the $1.2 million penalty as legally impermissible, the court of appeals reversed. In holding that punitive damages could be recovered from a municipal government under these provisions of the federal civil rights laws, the Eighth Circuit placed itself squarely in conflict with decisions of the Third and Sixth Circuits. Tellingly, the Eighth Circuit acknowledged that it was "sympathetic" to the Sixth Circuit's contrary view (which rested on concerns that were "hardly misplaced") and had reached the opposite conclusion "not with great satisfaction." App., *infra*, 12a, 13a, 15a. Nevertheless, the Eighth Circuit deemed itself "compel[led]" by this Court's decision in *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), to "part[] ways with our sister circuit" and to recognize an implied judicial remedy of punitive damages. App., *infra*, 13a, 15a-16a.

A. The Statutory Framework and This Court's Decision in *Franklin*

The Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, authorizes funding of vocational and other rehabilitation services for the disabled and imposes certain conditions on the recipients of federal funds. Among other things, the Act (in § 504) bars discrimination against persons with disabilities under federal grants and programs and (in § 501) places certain obligations on federal agencies with respect to the employment of the disabled. See 29 U.S.C. §§ 791, 794(a). Section 504 provides that "[n]o otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to

discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).

In 1978, Congress amended the Rehabilitation Act by adding a provision (§ 505) clarifying the procedures and remedies applicable to Section 504. Pub. L. No. 95-602, Title I, § 120(a), 92 Stat. 2982. It provides that "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance * * * under section 794 of this title." 29 U.S.C. § 794a(a)(2). Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* ("Title VI"), prohibits discrimination on the basis of race, color, or national origin "under any program or activity receiving Federal financial assistance."

In 1986, in response to *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234 (1985), Congress abrogated the States' Eleventh Amendment immunity with respect to suits based on violations of Section 504 of the Rehabilitation Act, Title VI, and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) ("Title IX"), which prohibits sex discrimination in educational activities and programs that receive federal funding. See 42 U.S.C. § 2000d-7(a)(1).

In 1987, Congress passed the Civil Rights Restoration Act, Pub. L. No. 100-259, 102 Stat. 28, which overturned *Grove City College* v. *Bell*, 465 U.S. 555 (1984), by defining "program or activity" in Title VI, Section 504 of the Rehabilitation Act, and related statutes to include "all of the operations" of an entity, "any part of which is extended Federal financial assistance." 42 U.S.C. § 2000d-4a.

In 1990, Congress passed the Americans with Disabilities Act ("ADA"). Section 202 of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42

U.S.C. § 12132. Section 203 of the ADA, in turn, specifies that "[t]he remedies, procedures, and rights set forth in section 794a of Title 29 [Section 504 of the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title." 42 U.S.C. § 12133.

In enacting Title VI, Title IX, Section 504 of the Rehabilitation Act, and Section 202 of the ADA, Congress did not expressly provide for a private cause of action. This Court, however, has ruled that implied rights of action exist under Title IX (*Cannon* v. *University of Chicago*, 441 U.S. 677, 704-05 (1979)), and Title VI (*Guardians Ass'n* v. *Civil Service Comm'n of the City of New York*, 463 U.S. 582 (1983)).

Following enactment of the ADA, Congress passed the Civil Rights Act of 1991, Pub. L. No. 102-166, Title I, § 102, 105 Stat. 1072, which, among other things, created a limited right to recover punitive damages (subject to specified monetary caps) in certain actions brought under Section 501 of the Rehabilitation Act, 29 U.S.C. § 791, and Section 102 of ADA, 42 U.S.C. § 12112. See 42 U.S.C. § 1981a(a)(2). The punitive damages provision does not apply to Section 504 of the Rehabilitation Act or to Section 202 of the ADA. The 1991 Act also provides that the newly authorized punitive damages remedy may not be recovered from any "government, government agency or political subdivision." *Id.* § 1981a(b)(1).

In *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Court held that an implied right of action under Title IX supports a claim for "monetary damages." *Id.* at 63. The Court reaffirmed the "general rule" that, "absent clear direction to the contrary by Congress, the federal courts have the power to award any *appropriate* relief in a cognizable cause of action brought pursuant to a federal statute." *Id.* at 70-71 (emphasis added). Based on its review, the Court found no evidence that Congress had intended to depart from this presumption. *Id.* at 72-73. Finally, the Court examined but

rejected several other arguments why an award of compensatory damages would be inappropriate. *Id.* at 73-76.

B. The Events Underlying This Lawsuit

Respondent Jeffrey Gorman was rendered paraplegic by an auto accident that occurred in 1988. On a Saturday night in May 1992, Gorman and a friend were out drinking at a country-and-western nightclub in Kansas City, Missouri, when they got into an altercation with a bouncer.[1] As a result, Gorman was forcibly expelled from the bar. Outside, he approached several police officers in the hope that they would intercede on his behalf. The officers, who were off duty and working as private security, instead told Gorman that he had to leave. When Gorman refused, he was placed under arrest for trespass. Gorman was subsequently convicted of one count of misdemeanor trespass.

While waiting for a police van that would transport him to the station for booking, Gorman told the off-duty officers that he had to go to the restroom to empty his full urine bag.[2] The off-duty officers (whom Gorman sued in a separate lawsuit, which was settled) told Gorman to wait until he got to the station. Sometime thereafter, a police van arrived driven by Officer Neil Becker. The van was equipped with a bench but lacked wheelchair locks, which would have permitted Gorman's transportation in his chair. Gorman testified at trial that he told

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[1] As the court appeals correctly noted, "[a]lmost every element of what happened that night was contested by the defendants, whose testimony was that Gorman did not instruct the officers how to transport him, offered no input whatsoever, and was thoroughly drunk and belligerent." App., *infra*, 3a n.2. Like the court of appeals, we present here Gorman's version of events because he prevailed below. *Ibid.*

[2] "Gorman * * * lacks voluntary control over his lower torso and legs, including his bladder. His inability to steady himself with his abdominal muscles and legs confines him to a wheelchair specially designed to keep him upright. He must also wear a catheter attached to a urine bag around his waist * * *." App., *infra*, 2a.

the officers that he was unable to stay upright without his wheelchair and could not ride in the van without risking a fall from the bench. Nevertheless, the officers placed Gorman on the bench and used a seatbelt to strap him in. The seatbelt did not properly hold Gorman upright, and it lay across his already full urine bag. According to Gorman's testimony, the officers loosened the seatbelt after he complained about it. As an extra precaution, however, the officers also used Gorman's own belt to strap him to the wire mesh behind the bench to secure him in an upright position.

Officer Becker, the only on-duty officer, then drove the van to the police station. As some point during the ride, Gorman released his seatbelt out of concern over the pressure it was placing on the urine bag. Eventually, the other belt also came undone and Gorman fell to the floor, causing the urine bag to rupture. Officer Becker stopped the van but was unable to lift Gorman by himself, so he fastened Gorman to a support in the back of the van for the duration of the trip. After arriving at the station, Gorman was booked, processed, and released.

C. The Proceedings Below

1. On May 30, 1995, Gorman filed an action in the United States District Court for the Western District of Missouri alleging that, "by reason of" his disability, he had been discriminated against and had been "excluded from participation in" or "denied the benefits of" the "programs" or "activities" of the Kansas City Police Department, in violation of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), and Section 202 of the ADA, 42 U.S.C. § 12132. Gorman named as defendants Officer Becker, then-Chief of Police Steven Bishop, and various current or former members of the Board of Police Commissioners of Kansas City ("the Board"), including the Mayor of Kansas City, Missouri (who by virtue of that position automatically serves as a Member of the Board).[3]

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[3] The Board members named in the original complaint were Mayor Emanuel Cleaver II, John Dillingham, Jack Headley, Jacqueline Paul, Balius Tate, Donna Boley, and Albert Riederer. Resp. C.A. App. 25. In an amended complaint filed on November 6, 1995, respondent added defendants Stacey Daniels[-Young] and James F. Ralls, Jr., and omitted defendant Riederer. Resp. C.A. App. 29; see also Pet. ii; note 4, *infra*.

Following an initial dismissal by the district court (see *Gorman* v. *Bishop*, 919 F. Supp. 326 (W.D. Mo. 1996); *Gorman* v. *Bartch*, 925 F. Supp. 653 (W.D. Mo. 1996)), the court of appeals remanded the case for a trial of respondent's claims against petitioners in their official capacity. App., *infra*, 35a-51a. A jury thereafter returned a verdict in respondent's favor, awarding him compensatory damages of $1,034,817.33 and punitive damages of $1,200,000.00. *Id.* at 4a.[4]

2. Relying (App., *infra*, 24a-27a) on the Sixth Circuit's en banc decision in *Moreno* v. *Consolidated Rail Corp.*, 99 F.3d 782 (1996), the district court set aside the award of punitive damages. App., *infra*, 21a-34a. The court explained that its "first task," under the framework articulated in this Court's *Franklin* decision, was "to determine whether there is a clear indication that Congress imposed limits on the scope of relief." App., *infra*, 25a. The court found such a clear indication in the three amendments made to Section 504 of the Rehabilitation Act in 1986, 1987, and 1991, as well in the "backdrop of judicial decisions" that existed at the time these amendments occurred. *Id.* at 25a-26a. Although "Congress amended portions of the Rehabilitation Act three times (including section

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[4] At the close of Gorman's case, the trial court dismissed the claims against Police Chief Easley and Officer Becker in their official capacities, thus leaving only the individual Board members as defendants. See 4/5/99 Tr. 495-496; Resp. C.A. App. 45 (jury instruction explaining dismissal). The district court's judgment was entered against Mayor Cleaver and Commissioners Stacey Daniels-Young, Jeffrey J. Simon, Joseph J. Mulvihill and Dennis C. Eckhold, all in their official capacities as members of the Board. While this case was on appeal, petitioner Kay Barnes succeeded Emanuel Cleaver II as Mayor of Kansas City and thus as a member of the Board.

504 twice) and the ADA once, * * * at no time did Congress take steps to alter the consensus of judicial decisions" holding that punitive damages "were not available." *Id.* at 25a-27a. "'The only inference of congressional intent that can be drawn from the three pieces of legislation is that Congress intended § 504 remedies to remain in status quo – *i.e.*, no punitive damages.'" *Id.* at 27a (quoting *Moreno*, 99 F.3d at 791).

3. The court of appeals affirmed in part and reversed in part. App., *infra*, 1a-20a. Although the panel stated that it was "sympathetic" to the Sixth Circuit's view that punitive damages are unavailable under Section 504 (*id.* at 8a, 12a), and even acknowledged that the "concerns" animating the Sixth Circuit were "hardly misplaced" (*id.* at 13a), it nevertheless ruled ("not with great satisfaction") that the Sixth Circuit's approach was "foreclosed by controlling precedent" (*id.* at 8a, 15a) – in particular, this Court's decision in *Franklin*.

As the Eighth Circuit read *Franklin*, there is a presumption that all "appropriate remedies" will be available in an implied cause of action, which can be overcome only if Congress "expressly limit[s] the remedies available." App., *infra*, 11a-12a. In the court of appeals' view, because this Court had "long made clear that punitive damages are an integral part of the common law tradition and the judicial arsenal," punitive damages "fall within the panoply of remedies *usually available* to American courts." *Id.* at 10a (emphasis added) (citing *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991)). "Given an implied cause of action," the Eighth Circuit reasoned, *Franklin* "compels the conclusion" that a plaintiff may recover "all appropriate remedies, including punitive damages" – unless there is an "express congressional statement to the contrary." *Ibid.*

Unlike the Sixth Circuit – whose "methodology and conclusions" the court below explicitly rejected (App., *infra*, 12a) – the Eighth Circuit could not discern the requisite congressional intent to foreclose a punitive damages remedy. The court recognized that its analysis "turns * * * on its head"

Congress's understanding, evident in the "text and history of the 1991 Act" (which added a limited punitive damages remedy), that in so doing Congress "intended to expand, and not to contract, the available remedies" under the Rehabilitation Act and ADA, and "considered the new language necessary to create a punitive damages remedy under the acts." *Id.* at 15a. But that evidence was not sufficiently "express" to persuade the court of appeals that Congress intended to preclude resort to punitive damages as a remedy in cases not covered by the narrow 1991 provision.

The court of appeals then remanded the case for a determination (purportedly under *Franklin*) whether an award of punitive damages was "appropriate" in this "specific case." App., *infra*, 16a. Again, the panel flatly disagreed with the Sixth Circuit. As a *categorical* matter, that court had held that, "given the legislative and judicial backdrop" and a number of policy considerations, punitive damages are "not 'appropriate' as required by *Franklin*" in *any* action brought under Section 504 of the Rehabilitation Act. *Id.* at 16 n.10 (citing *Moreno*, 99 F.3d at 791-92). In the Eighth Circuit's view, the question whether a remedy is "appropriate" under *Franklin* is a case-specific (not statute-specific) inquiry. App., *infra*, 16a & n.10. The court therefore remanded for consideration of whether the punitive award in this case was supported by sufficient evidence and not constitutionally excessive.

REASONS FOR GRANTING THE PETITION

This case presents the Court with a valuable opportunity to resolve an important question of federal law on which the circuits are sharply divided: whether punitive damages are an appropriate implied remedy in private disability discrimination lawsuits brought against municipal governments (and perhaps other defendants) under Section 504 of the Rehabilitation Act and Section 202 of the ADA. Because those provisions apply to a wide array of public "programs," "activities," and (in the case of the ADA) "services," see *Pennsylvania Dep't of*

Corrections v. *Yeskey*, 524 U.S. 206 (1998), the question presented in this case has arisen with great frequency.

Much of the confusion in the lower courts boils down to disagreements over the meaning of *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), which only this Court can clarify. Perhaps for that reason, and because it felt "compel[led]" by its reading of *Franklin* (App, *infra*, 13a) to reach a result it regarded as questionable (*id.* at 8a, 12a), the Eighth Circuit all but invited this Court to review its decision. See *id.* at 15a-16a ("Perhaps our parting ways with our sister circuit will prompt the Supreme Court or Congress to inject additional clarity into this area."). The Court should accept that invitation, correct the serious errors made by the Eighth Circuit, and ensure that *Franklin* is not used as a vehicle for working future incursions into the traditional immunity of municipalities from punitive liability, see *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981).

A. THE EIGHTH CIRCUIT'S DECISION DEEPENS AN ENTRENCHED CIRCUIT CONFLICT

In holding that punitive damages were recoverable, the Eighth Circuit expressly disagreed with the Sixth Circuit's en banc decision in *Moreno* v. *Consolidated Rail Corp.*, 99 F.3d 782 (1996). Although the Eighth Circuit believed that "only one other circuit" besides itself "has addressed" this issue (App., *infra*, 8a), in fact the conflict is much deeper. As we explain below, two additional circuits – and scores of district courts – have taken conflicting positions on the availability of punitive damages in disability discrimination lawsuits brought against government defendants under Section 504 of the Rehabilitation Act and Section 202 of the ADA. To resolve the mature conflict in the circuits on the question of punitive damages, and to clarify the meaning of *Franklin*, further review is warranted.

1. In *Moreno*, the Sixth Circuit squarely held that punitive damages are not an appropriate remedy in an implied cause of action under Section 504. The en banc majority conducted an

extensive review of the amendments made to the Rehabilitation Act between 1986 and 1991 as well as "the background against which Congress was legislating." 99 F.3d at 789. At the time these amendments were made, the Sixth Circuit explained, "punitive damages had never been awarded under § 504 and were widely believed to be unavailable under that section" as well as "under Title VI." *Id.* at 790-91 (citing cases). "In fact, it is not until 1994 that we find a single case where punitive damages were awarded under § 504." *Id.* at 790. Moreover, in neither the 1986 nor 1987 amendments (see page 3, *supra*) "did Congress indicate any desire to change the established understanding that punitive damages were not available." *Ibid.* Finally, the Civil Rights Act of 1991, which "made punitive damages available – for the first time – under § 501 of the Rehabilitation Act," pointedly failed to "extend the new punitive damages provision to § 504." *Ibid.* "The only inference of congressional intent that can be drawn from the three pieces of legislation is that Congress intended § 504 remedies to remain in *statu quo* – *i.e.*, no punitive damages." *Id.* at 791.

The Sixth Circuit also concluded (99 F.3d at 791) that "punitive damages are not 'appropriate' under § 504 in any event" – as that court understood the word "appropriate" in *Franklin*. "It would be highly anomalous" the court explained, "to let a plaintiff asserting an implied right of action under § 504 recover more in punitive damages than could be recovered by a plaintiff asserting the statutory remedy created for § 501." *Ibid.* Moreover, the court noted, "Congress has chosen other ways to 'punish' those who violate § 504" (99 F.3d at 791), in particular the termination of funding through administrative procedures. Finally, "judicial creation of a punitive damages remedy" would have the effect of "expand[ing] § 504 beyond all 'manageable bounds'" (*id.* at 792 (quoting *Alexander* v. *Choate*, 469 U.S. 287, 299 (1985))), thereby "upset[ting] a long-standing balance that the courts, absent some contrary directive by Congress, should be vigilant to preserve." *Ibid.*

The Eighth Circuit in this case sharply disagreed with both the result in *Moreno* and what it termed the Sixth Circuit's "methodology." App., *infra*, 12a. In so doing, the court below essentially cast its lot with the two members of the Sixth Circuit who dissented from the 11-2 en banc opinion. See *Moreno*, 99 F.3d at 793-96 (opinions of Judges Martin and Daughtrey, concurring in part and dissenting in part).

2. Contrary to the Eighth Circuit's suggestion, the Sixth Circuit is not the only court of appeals to have resolved the issue presented in this case. The Fourth Circuit has also held – albeit somewhat obliquely – that punitive damages may be recovered in an action brought under Section 504 of the Rehabilitation Act. In *Pandazides* v. *Virginia Board of Education*, 13 F.3d 823 (4th Cir. 1994), the court was faced with the question whether a plaintiff suing under Section 504 is entitled to a jury trial under the Seventh Amendment. To resolve that issue, the Fourth Circuit examined "whether the remedy available is * * * legal or equitable in nature." 13 F.3d at 828-29. In considering "the character of the damages available under § 504," the Fourth Circuit observed that the "lower courts are split over the availability of * * * punitive damages" in this setting. *Id.* at 829-30. It went on to rule that its prior decision in *Eastman* v. *Virginia Polytechnic Inst. & State University*, 939 F.2d 204 (4th Cir. 1991), which held that punitive damages "were unavailable under § 504," was "no longer * * * good law" in light of *Franklin*. 13 F.3d at 830. Because, in its view, *Franklin* requires that "a full panoply of legal remedies" (including punitive damages) be available under Section 504, see 13 F.3d at 830-32, the Fourth Circuit held that "a jury trial is constitutionally mandated under § 504." *Id.* at 832.

The Third Circuit recently took sides in this debate as well. In *Doe* v. *County of Centre*, 242 F.3d 437 (3d Cir. 2001), it held – consistent with the Sixth Circuit's decision in *Moreno* but in conflict with *Pandazides* and the Eighth Circuit's decision below – that punitive damages are not recoverable in an action brought against a municipal government under Section 504 of

the Rehabilitation Act and Section 202 of the ADA. Relying primarily on *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981), which rejected municipal liability for punitive damages under 42 U.S.C. § 1983, the Third Circuit rejected the argument (accepted by the Eighth Circuit in this case) that *Franklin* requires a different result. *Id.* at 456-58. The Third Circuit recognized (*id.* at 456) that "the Fourth Circuit held in *Pandazides*" that a "plaintiff could seek punitive damages under Section 504," but pointedly refused to follow the Fourth Circuit's lead.[5] The Third Circuit also acknowledged (*ibid.*) the conflict between *Pandazides* and *Moreno*.[6]

3. Although the remaining circuits have yet to issue definitive rulings on the question presented, the existence of a circuit conflict has not gone unnoticed. The Tenth Circuit, in expressly reserving the issue "whether punitive damages are available under Section 504," has acknowledged the conflict between *Moreno* and *Pandazides*. *Roberts* v. *Progressive Independence, Inc.*, 183 F.3d 1215, 1223 (10th Cir. 1999). So, too, has the Second Circuit in recently declining to decide the availability of punitive damages under Title VI. *Tolbert* v. *Queens College*, 242 F.3d 58, 75-76 (2d Cir. 2001).[7] And not

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[5] District courts in the Fourth Circuit have followed *Pandazides*'s holding concerning the availability of punitive damages. See, *e.g.*, *Proctor* v. *Prince George's Hosp. Center*, 32 F. Supp. 2d 820, 829 (D. Md. 1998) (rejecting argument "that punitive damages are not available under the Rehabilitation Act" on ground that it "directly contradicts *Pandazides*"). Cf. *Turner* v. *First Hosp. Corp. of Norfolk*, 772 F. Supp. 284, 287-88 (E.D. Va. 1991) (holding punitive damages unavailable in decision predating *Pandazides*).

[6] District courts in the Sixth Circuit have since applied *Moreno* in a number of cases. See, *e.g.*, *Dorsey* v. *City of Detroit*, 157 F. Supp. 2d 729, 731 (E.D. Mich. 2001); *Key* v. *Grayson*, 2001 WL 1083714, at *6, *19 (E.D. Mich. Sept. 5, 2001); *Ability Center of Greater Toledo* v. *Sandusky*, 133 F. Supp. 2d 589 (N.D. Ohio 2001).

[7] Many district courts have likewise taken note of the circuit conflict.

surprisingly, in the absence of dispositive circuit court rulings, district courts outside the Third, Fourth, Sixth, and Eighth Circuits have reached conflicting results since *Franklin* on the question whether punitive damages may be recovered in an action brought under Section 504 of the Rehabilitation Act or Section 202 of the ADA:

- In the First Circuit, district courts generally have allowed punitive damages claims to proceed. See *Levier* v. *Scarborough Police Dep't*, 2000 WL 761003, at *1 (D. Me. May 10, 2000) (Section 504 and Section 202); *Kilroy* v. *Husson College*, 959 F. Supp. 22, 24 (D. Me. 1997) (Section 504); *McKay* v. *Winthrop Board of Education*, 1997 WL 816505, at *1, *2 (D. Me. June 6, 1997) (both provisions); *Penney* v. *Town of Middleton*, 888 F. Supp. 332, 342 (D.N.H. 1994) (Section 504).

- In the Second Circuit, district courts have reached conflicting results. Compare *Bayon* v. *State University of New York at Buffalo*, 2001 WL 135817, at *4 (W.D.N.Y. Feb. 15, 2001) (punitive damages not available under Section 202), and *Kuntz* v. *City of New Haven*, 1993 WL 276945, at *18 (D. Conn. Mar. 3, 1993) (same under Section 504), with *Hunt* v. *Meharry Medical College*, 2000 WL 739551, at *4 (S.D.N.Y. June 8, 2000) (punitive damages available under Section 504), and *Hernandez* v. *City of Hartford*, 959 F. Supp. 125, 133-34 (D. Conn. 1997) (same under Sections 202 and 504), and *Zaffino* v. *Surles*, 1995 WL 146207, at *1-3 (S.D.N.Y. Mar. 31, 1995) (same under Section 504), and *DeLeo* v. *City of Stamford*, 919 F. Supp. 70, 72-74 (D. Conn. 1995) (same).

- In the Fifth Circuit, one district court has ruled that punitive damages may not be recovered under Section 504.

See, *e.g.*, *Proctor*, 32 F. Supp. 2d at 829-30 (conflict between *Moreno* and *Pandazides*); *Doe* v. *Oyster River Co-op. School Dist.*, 992 F. Supp. 467, 482 n.15 (D.N.H. 1997) (same); *Kilroy* v. *Husson College*, 959 F. Supp. 22, 24 (D. Me. 1997) (same).

See *United States* v. *Forest Dale, Inc.*, 818 F. Supp. 954, 970 (N.D. Tex. 1993).

- In the Seventh Circuit, district courts have reached conflicting decisions. Compare *Winfrey* v. *City of Chicago*, 957 F. Supp. 1014, 1024-25 (N.D. Ill. 1997) (punitive damages not recoverable under Section 202), and *Dertz* v. *City of Chicago*, 1997 WL 85169, at *20 (N.D. Ill. Feb. 24, 1997) (same under Section 202 and Section 504), with *Garrett* v. *Chicago School Reform Board of Trustees*, 1996 WL 411319, at *3-4 (N.D. Ill. July 19, 1996) (punitive damages available under Section 202 and Section 504), and *Simenson* v. *Hoffman*, 1995 WL 631804, at *6-7 (N.D. Ill. Oct. 24, 1995) (same under Section 504).

- In the Ninth Circuit, district courts have allowed punitive damages claims. See *Henkle* v. *Gregory*, 150 F. Supp. 2d 1067, 1077-78 (D. Nev. 2001) (Section 504); *Patricia N.* v. *Lemahieu*, 141 F. Supp. 2d 1243, 1252-53 (D. Haw. 2001) (Section 202 and Section 504); *Burns-Vidlak* v. *Chandler*, 980 F. Supp. 1144, 1146-52 (D. Haw. 1997), appeal dismissed, 165 F.3d 1257 (9th Cir. 1999).

- In the Tenth Circuit, one district court has ruled that punitive damages may not be recovered under Section 504. See *Tafoya* v. *Bobroff*, 865 F. Supp. 743, 748, 751 (D.N.M. 1994), aff'd mem., 74 F.3d 1250 (10th Cir. 1996); cf. *Roberts*, 183 F.3d at 1223 (reserving issue).

- In the Eleventh Circuit, one district court has ruled that punitive damages may not be recovered against a municipal government on a claim brought under Section 202 of the ADA. See *Harrelson* v. *Elmore County*, 859 F. Supp. 1465, 1468-69 (M.D. Ala. 1994).[8]

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[8] The division of authority has not escaped the notice of commentators. See, *e.g.*, 1 B. LINDEMANN & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 224, 227 (2000 Cum. Supp.); *Remedies – Punitive Damages – Americans with Disabilities Act – Rehabilitation Act*, FED. LITIGATOR,

4. This Court should intervene now to resolve the 2-2 circuit conflict and bring uniformity to this important area of federal law. Federal law should not impose punitive liability under Section 504 of the Rehabilitation Act and Section 202 of the ADA on municipal governments (and other defendants) in Arkansas, Iowa, Maryland, Minnesota, Missouri, Nebraska, North Carolina, North Dakota, South Carolina, South Dakota, Virginia, and West Virginia but not on similarly situated defendants in Delaware, Kentucky, Michigan, New Jersey, Ohio, Pennsylvania, Tennessee, and the Virgin Islands.

Nor is there any realistic possibility that the entrenched conflict in the circuits will disappear. The Sixth Circuit's decision in *Moreno* was rendered by an en banc court and has since been extended to claims brought under Section 202 of the ADA. *Johnson* v. *City of Saline*, 151 F.3d 564, 573 (6th Cir. 1998). And the Eighth Circuit in this case declined (over the dissenting votes of Judges Bowman and Loken) to rehear this case en banc, notwithstanding the acknowledged conflict with the Sixth Circuit. App., *infra*, 52a. The panel itself pleaded for clarification by this Court. *Id.* at 15a-16a.

Finally, the entrenched conflict in the circuits comes down, in the end, to a fundamental disagreement over the meaning of *Franklin*. As noted above, that disagreement is apparent in a comparison of *Moreno* and the Eighth Circuit's decision in this case. Even in cases not involving the federal statutes governing disability, race, or gender discrimination in the provision of public services, courts of appeals have adopted vastly different understandings of what *Franklin* requires. Compare *Reich* v. *Cambridgeport Air Systems, Inc.*, 26 F.3d 1187, 1190-92, 1194

Sept. 2001, at 236, 237 (noting circuit split); Milani, *Living in the World: A New Look at the Disabled in the Law of Torts*, 48 CATH. U.L. REV. 323, 415 & n.425 (1999) ("courts remain split on the availability of punitive damages claims under section 504") (collecting cases); Tucker, *Access to Health Care for Individuals with Hearing Impairments*, 37 HOUSTON L. REV. 1101, 1128-29 (2000).

(1st Cir. 1994) (relying on the "broad and unequivocal language in *Franklin*" as a basis for construing the statutory phrase "all appropriate relief" in Section 11(c) of the OSH Act, 29 U.S.C. § 660(c), as authorizing a punitive award of double backpay damages), with *Knapp* v. *Eagle Property Management Corp.*, 54 F.3d 1272, 1277-79 (7th Cir. 1995) (refusing to read *Franklin* as "dictating the conclusion that *all* monetary damages are recoverable in every implied cause of action," and disallowing certain forms of compensatory damages in discrimination action brought by participant in federal rent assistance program under 42 U.S.C. § 1437f(t)(1)(B)). Because only this Court can clarify *Franklin*'s meaning, and its relationship to the principles underlying *City of Newport*, further review is needed.

B. THE ISSUES RAISED ARE IMPORTANT AND RECURRING

Whether the courts should recognize a punitive damages remedy under Section 504 of the Rehabilitation Act and Section 202 of the ADA is an important question of federal law. As the many cases cited above make clear, this issue has arisen with great frequency in the federal courts (and indeed has the potential to arise in virtually any case brought under these statutory provisions). That is a substantial category of litigation because each of these provisions has an exceedingly broad reach. See pages 9-10, *supra*. See also 42 U.S.C. § 12131(1) (ADA provision broadly defining "public entity"); 29 U.S.C. § 794(b) (defining "programs" and "activities" subject to Section 504 as including "all of the operations of" a broad range of entities). As the Sixth Circuit has correctly observed (and as this case graphically illustrates), "the phrase 'services, programs or activities'" in Section 202 of the ADA "encompasses virtually everything that a public entity does." *Johnson* v. *City of Saline*, 151 F.3d 564, 569 (6th Cir. 1998).

Moreover, because the Rehabilitation Act (like other statutes) specifically borrows the remedies available under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, the proper resolution of this case is likely to affect the availability of puni-

tive damages under Title VI as well as other closely related provisions of federal civil rights laws, including Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a). This close linkage is confirmed by the Eighth Circuit's decision, which rested on the premise that punitive damages are also available under Title VI. App., *infra*, 11a ("we must * * * conclude that Congress assumed the availability of all remedies, including punitive damages, under Title VI"); *id.* at 13a (*Franklin* "compel[s]" this conclusion). As this Court is well aware, the volume of litigation brought under these related federal civil rights laws is also quite substantial. See, *e.g.*, *Gebser* v. *Lago Vista Independent School Dist.*, 524 U.S. 274, 292 (1998) ("The number of reported [Title IX] cases concerning sexual harassment of students in schools confirms that harassment is an all too common aspect of the educational experience."). It therefore comes as no surprise that, since *Franklin*, numerous lower courts have considered whether punitive damages are recoverable in cases brought under Title VI[9] or Title IX.[10]

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[9] See. *e.g.*, *Bayon* v. *State University of New York at Buffalo*, 2001 WL 135817, at *4 (W.D.N.Y. Feb. 15, 2001) (punitive damages unavailable under Title VI); *Sims* v. *Unified Government of Wyandotte County*, 120 F. Supp. 2d 938, 947 (D. Kan. 2000) (same); see also *Singh* v. *Superintending Sch. Comm.*, 601 F. Supp. 865, 867 (D. Maine 1985) (same) (pre-*Franklin*). But see *Davison* v. *Santa Barbara High School Dist.*, 48 F. Supp. 2d 1225, 1233 (C.D. Cal. 1998) (punitive damages available under Title VI). Cf. also *Tolbert* v. *Queens College*, 242 F.3d 58, 75-76 (2d Cir. 2001) (declining to decide issue).

[10] See, *e.g.*, *Landon* v. *Oswego Unit School Dist. No. 308*, 143 F. Supp. 2d 1011, 1013-14 (N.D. Ill. 2001) (punitive damages unavailable under Title IX); *Booker* v. *City of Boston*, 2000 WL 1868180, at *4 (D. Mass. Dec. 12, 2000) (same); *Morlock* v. *West Central Education Dist.*, 46 F. Supp. 2d 892, 924 (D. Minn. 1999) (same); *Crawford* v. *School Dist. of Philadelphia*, 1998 WL 288288, at *2 (E.D. Pa. June 3, 1998) (same); *Doe* v. *Londonderry School Dist.*, 970 F. Supp. 64, 75-76 (D.N.H.) (same), modified in other respects, 32 F. Supp. 2d 1360 (1997); *Collier* v. *William Penn School Dist.*, 956 F. Supp.1209, 1217 (E.D. Pa. 1997) (same), rev'd mem., 191 F.3d 444

In recent years, this Court has repeatedly granted review to resolve conflicts over the meaning of these important federal statutes (as well as the related provisions in Title VI and Title IX). See, *e.g.*, *Alexander* v. *Sandoval*, 121 S. Ct. 1511 (2001); *Davis* v. *Monroe County Board of Education*, 526 U.S. 629 (1999); *Gebser*, *supra*; *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206 (1998); *Lane* v. *Peña*, 518 U.S. 187 (1996); *Franklin*, *supra*. Most of these cases, moreover, have involved the scope of liability or remedies under implied rights of action. See also *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624 (1984); *Guardians Ass'n* v. *Civil Service Comm'n of the City of New York*, 463 U.S. 582 (1983); *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979); *Lau* v. *Nichols*, 414 U.S. 563 (1974). The Court's extensive activity in this area demonstrates not only the complex nature of this body of law and the Court's special role in defining implied rights of action but also the national importance of questions arising under the federal civil rights laws.

Finally, the issues raised in this case have special importance for municipal governments.[11] If review is granted, petitioners will argue not only that punitive damages are gen-

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(1999). See also *Doe* v. *Oyster River Co-op. School Dist.*, 992 F. Supp. 467, 481-84 (D.N.H. 1997) (discussing issue without resolving it). But see *Canty* v. *Old Rochester Regional School Dist.*, 66 F. Supp. 2d 114, 118 (D. Mass. 1999) (plaintiff may recover punitive damages, but only upon a showing that school district "continues to commit egregious violations of Title IX" at time of trial "with no sign of relenting").

[11] They also have significance for the States, which have been held to waive their Eleventh Amendment immunity from suit under Section 504 of the Rehabilitation Act when they accept federal funds. See *Jim C.* v. *United States*, 235 F.3d 1079, 1081-82 (8th Cir. 2000) (en banc), cert. denied, 121 S. Ct. 2591 (2001). Moreover, the lower courts are divided over whether Congress validly abrogated the States' Eleventh Amendment immunity under Title II of the ADA, which includes Section 202. See *Doe* v. *Division of Youth & Family Servs.*, 148 F. Supp. 2d 462, 485-86 (D.N.J. 2001) (collecting cases); App., *infra*, 5a.

erally unavailable under the relevant provisions of the Rehabilitation Act and ADA, but also that, at a minimum, punitive damages are unavailable on claims asserted against municipal governments. This case accordingly is important because of its potential to clarify the applicability of the principles underlying *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981), outside the context of 42 U.S.C. § 1983. Moreover, the ramifications for municipal treasuries can hardly be overstated. In this case, respondent (in addition to being fully compensated) was awarded punitive damages of $1.2 million. And, of course, the mere availability of punitive damages will have the obvious effect of raising settlement values in cases brought under the relevant civil rights laws, with attendant, adverse consequences for government treasuries (and therefore for taxpayers).

C. THE DECISION BELOW IS MANIFESTLY INCORRECT

Further review is also warranted because the Eighth Circuit's decision is seriously flawed. The court of appeals has upheld the availability of punitive damages under the Rehabilitation Act even though – as the lower court candidly acknowledged – there was "near unanimity" in the federal courts in the first two decades of that statute's life that it would *not* support a claim for punitive damages (and neither would Title VI or Title IX). App., *infra*, 12a. The Eighth Circuit approved punitive liability even while acknowledging that, when Congress in 1991 amended *other* provisions of the Rehabilitation Act and the ADA to allow a limited punitive damages remedy subject to a cap, it "considered the new language necessary to create a punitive damages remedy under the acts" and "intended to expand, and not contract, the available remedies." *Id.* at 15a. And the lower court reached that result in a case involving a municipal defendant, even though "municipal immunity from punitive damages" was firmly "established at common law" more than a century ago and "has persisted to the present day in the vast majority of jurisdictions." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 258-61 (1981).

Why? In the Eighth Circuit's view, this stark break with tradition was "compel[led]" by this Court's decision in *Franklin*. App., *infra*, 10a. In the lower court's view, *Franklin* created a "one-way ratchet" under which, "once a cause of action is discovered, it *automatically* entitles a plaintiff to *all* appropriate remedies," including punitive damages – "and that finding then extends those remedies to *all other* interrelated statutes." App., *infra*, 14a (emphasis added). Moreover, unless Congress "expressly limit[s] the remedies available" (*id.* at 12a) – which is no small feat given that the private right of action is implied (as well as subsequently defined by the judiciary) – courts must ignore other, telling evidence of congressional intent, such as the legislative intent underlying amendments made to the statute, the backdrop of judicial interpretation at the time such amendments are made, and even principles of governmental immunity that have been settled for more than a century. The consequence of that sweeping approach to implied rights of action, perversely enough, is that "the most questionable of private rights will also be the most expansively remediable." *Franklin*, 503 U.S. at 78 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., concurring in the judgment). There is absolutely no basis for that result.

1. To begin with, *Franklin* is simply not the judicial straitjacket the court of appeals thought it to be. As the Sixth Circuit correctly recognized, *Franklin* invites courts to "engage in a two-part inquiry": first, "whether there is any clear indication of congressional intent to limit the presumption in favor of any and all appropriate damage remedies; and second, absent any such indication, * * * whether the remedy in question is 'appropriate.'" *Moreno* v. *Consolidated Rail Corp.*, 99 F.3d 782, 789 (6th Cir.1996) (en banc). But there is nothing in *Franklin* that forbids courts, during the first step of that inquiry, to consider legislative amendments, the "background against which Congress was legislating" (*id.* at 789), and any other evidence that might shed light on whether Congress lacked an intent to authorize a particular remedy. Similarly, there is no basis on which to interpret *Franklin*'s reference to "appropriate" remedies nar-

rowly as meaning "'appropriate' *in a specific case*" (App., *infra*, 16a (emphasis added)). A remedy may be "inappropriate" for a particular statutory scheme, or because it undercuts well-established principles of law, and not just because it does not fit the conduct at issue in a particular lawsuit. See *International Bhd. of Elec. Workers* v. *Foust*, 442 U.S. 42, 48-52 (1979) (rejecting implied remedy of punitive damages under the Railway Labor Act as inconsistent with national labor policy).

2. Several of this Court's decisions since *Franklin* demonstrate the error of the Eighth Circuit's approach. In *Gebser* v. *Lago Vista Independent School Dist.*, 524 U.S. 274 (1998), this Court rejected an argument predicated on an expansive reading of *Franklin*. In that case, which (like *Franklin* itself) involved a Title IX action for damages brought against a school district, the Court pointed out that it had "made no effort in *Franklin*" to specify "the circumstances in which a damages remedy should lie." *Id.* at 284. Moreover, the Court emphasized that, "[b]ecause the private right of action under Title IX is judicially implied, we have a measure of latitude to shape a sensible remedial scheme that best comports with the statute." *Ibid.* *Franklin*'s "general rule" concerning the availability of all appropriate relief, the Court observed, must "yield[] where necessary to carry out the intent of Congress or to avoid frustrating the purposes of the statute involved." *Id.* at 285 (internal quotations omitted).

Applying those principles, the Court held that it would frustrate the purposes of Title IX to allow recovery against a school district on the basis of *respondeat superior* or a theory of constructive notice. *Gebser*, 524 U.S. at 285. In words equally applicable to this case, the Court emphasized that, "[w]hen Title IX was enacted in 1972, the principal civil rights statutes containing an express right of action did not provide for recovery of monetary damages at all, instead allowing only injunctive and equitable relief." *Ibid.* The Court also reasoned that the "implied damages remedy should be fashioned along the same lines" as Title IX's "express remedial scheme," which

allows for suspension or termination of federal funding and "is predicated upon notice to an 'appropriate person' and an opportunity to rectify any violation, 20 U.S.C. § 1682." *Id.* at 290. The Court relied as well on the fact that "[i]t was not until 1991 that Congress made damages available under Title VII, and even then, Congress carefully limited the amount recoverable in any individual case." *Id.* at 286. "Adopting petitioner's position," the Court explained, "would amount * * * to allowing unlimited recovery of damages under Title IX where Congress has not spoken on the subject of either the right or the remedy, and in the face of evidence that when Congress expressly considered both in Title VII it restricted the amount of damages available." *Ibid.*

Here, as in *Gebser*, the Eighth Circuit should have taken account of the fact that when the Rehabilitation Act was enacted in 1973 – *and* when it was amended in 1986, 1987, and 1991 – there was "near unanimity" (App., *infra*, 12a) in the federal courts about the *unavailability* of punitive damages (and similar unanimity existed at that time with respect to Title VI and Title IX). See also *Moreno*, 99 F.3d at 789-91 (discussing this history and background understanding and concluding that it provided "a pretty clear indication" that "Congress did not intend to allow" punitive damages). Here, as in *Gebser*, the Eighth Circuit should have recognized that it possessed a "measure of latitude" in applying *Franklin* and should have considered the implications of Congress's creation in 1991 of a limited punitive damages remedy applicable to *other* provisions of the Rehabilitation Act (and inapplicable to municipal governments). And here, as in *Gebser*, the Eighth Circuit should have recognized that any inquiry into Congress's intent under *Franklin* must be informed by such considerations as the Rehabilitation Act's "express remedial scheme" and whether punitive damages would be consistent with the purposes underlying the statutes. The Eighth Circuit, however, did none of this.

The error in the court of appeals' analysis is also demonstrated by *Lane* v. *Peña*, 518 U.S. 187 (1996), where this Court

held that a private plaintiff suing under Section 504 of the Rehabilitation Act may not recover monetary damages against the *federal* government. Rejecting another argument that *Franklin* mandated a contrary result, the Court explained that *Franklin* "involved an action against nonfederal defendants under Title IX" and could not be applied "wholesale" to actions against the federal government given the federal government's traditional immunity. 518 U.S. at 196-97. Here, as in *Lane*, any inquiry into available remedies and Congress's intent should have taken into account the backdrop of well-settled governmental immunities. *City of Newport*, *supra*. The Eighth Circuit failed to do so, contrary to the teachings of *Lane*.

3. Had the Eighth Circuit's taken account of these considerations, rather than applying a cramped and incorrect interpretation of *Franklin*, it would have found ample evidence that Congress never intended to authorize the recovery of punitive damages under Section 504 of the Rehabilitation Act or Section 202 of the ADA (and that such a remedy was wholly inappropriate). We outline below several of the most obvious considerations pointing toward this conclusion.

a. As the lower court correctly noted, "Congress extended the remedies available under Title VI to section 504 in 1978, 29 U.S.C. § 794a, and then to section 202 [of the ADA] in 1990, 42 U.S.C. § 12133." App., *infra*, 12a. Congress made further amendments to the Rehabilitation Act in 1986, 1987, and 1991. See pages 3-4, *supra*. At the time Congress enacted these remedial provisions and further amendments, "punitive damages had never been awarded under § 504 and were widely believed to be unavailable under that section" as well as "under Title VI." *Moreno*, 99 F.3d at 790 (citing cases); see also App., *infra*, 13a-14a & n.9 (same). "The repeated * * * amendments to the Rehabilitation Act without altering the existing understanding that punitive damages were not available under § 504 [are] a pretty clear indication * * * that Congress did not intend to allow such damages." *Moreno*, 99 F.3d at 791; accord *Gebser*, 524 U.S. at 285.

b. The Civil Rights Act of 1991 strongly confirms Congress's lack of intent to authorize (and the inappropriateness of) punitive damages in actions brought under Section 504 of the Rehabilitation Act and Section 202 of the ADA. The 1991 Act created a limited and carefully defined right to recover punitive damages (subject to specified monetary caps based on the size of the offending employer) in certain actions brought for intentional discrimination in employment. The punitive damages provision applied to actions brought under Section 501 of the Rehabilitation Act, 29 U.S.C. § 791, and Section 102 of Title I of the ADA, 42 U.S.C. § 12112. It did *not* apply to actions brought under Section 504 or 202. Moreover, the 1991 Act *expressly exempts* from punitive liability under its new provisions any "government, government agency or political subdivision." 42 U.S.C. § 1981a(b)(1); see *County of Centre*, 242 F.3d at 457.

As the Eighth Circuit recognized in this case, but inexplicably failed to credit, the "text and history of the 1991 Act" make clear that in enacting these provisions "Congress intended to expand, and not to contract, the available remedies" under the Rehabilitation Act and ADA. App., *infra*, 15a; see also *ibid.* (making same observation about legislation proposed, but not enacted, in 1992). See generally *Kolstad* v. *American Dental Ass'n*, 527 U.S. 533, 534 (1999) ("Congress provided for *additional* remedies, including punitive damages for certain classes of Title VII and ADA violations.") (emphasis added). Moreover, as several courts have recognized,[12] the mere juxtaposition, without more, of the limited punitive damages provisions of the 1991 Act (42 U.S.C. § 1981a) on the one

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[12] See, *e.g.*, *Bayon* v. *State University of New York at Buffalo*, 2001 WL 135817, at *4 (W.D.N.Y. Feb. 15, 2001) (1991 Act's creation of punitive damages remedy under Title I of ADA "counsels against any inference that punitive damages are available under Title II"); *Harrelson* v. *Elmore County*, 859 F. Supp. 1465, 1468 (M.D. Ala. 1994) (same). But see *Kedra* v. *Nazareth Hosp.*, 868 F. Supp. 733, 740 (E.D. Pa. 1994) (relying on 1991 Act's creation of punitive damages remedy under Title VII as reason for permitting punitive damages under Section 504).

hand, and the remedial provision governing Section 504 and Section 202 (29 U.S.C. § 794a; 42 U.S.C. § 12133) on the other, provides structural evidence of an intent on Congress's part not to authorize punitive damages under the latter provisions. See also *Kolstad*, 527 U.S. at 534 ("The very structure of § 1981a suggests a congressional intent to authorize punitive damages only in a subset of cases involving intentional discrimination"). Finally, Congress's express exemption of governmental entities from punitive liability under the 1991 Act provides powerful evidence of Congress's intent not to permit punitive liability in a case such as this. See also *Gebser*, 524 U.S. at 285 (refusing to "allow[] unlimited recovery of damages under Title IX where Congress has not spoken on the subject of either the right or the remedy, and in the face of evidence [in the 1991 Act] that when Congress expressly considered both in Title VII it restricted the amount of damages available").

c. In *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981), this Court detailed the long tradition in American law – continuing to this day – of affording municipal governments immunity from punitive damages. *Id.* at 259-63. Next, the Court scoured the legislative history of the Civil Rights Act of 1871, 42 U.S.C. § 1983, for evidence that Congress "intended to disturb the settled common-law immunity," of which Congress was presumptively aware. 453 U.S. at 263-266. Finally, the Court examined "whether considerations of public policy dictate" recognition of a punitive damages remedy against municipalities despite the longstanding immunity and the absence of evidence of congressional intent to impose such novel liability. *Id.* at 267-71.

In holding that Section 1983 does not impose punitive liability on municipal governments, this Court explained that the deterrent and retributive objectives underlying punitive damages are not served by imposing them on municipalities. "Regarding retribution," the Court stated, "it remains true that an award of punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the

tort." 453 U.S. at 267. Punitive damages in this setting, the Court added, "are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for citizens footing the bill." *Ibid.* The Court explained that the goal of deterrence is not served by the imposition of punitive damages. *Id.* at 268-70. Finally, the Court expressed concern over the "very real" costs and risks associated with allowing private individuals to visit punishments upon municipal governments. See *id.* at 270-71.

As the Third Circuit recognized in its conflicting decision in *County of Centre*, 242 F.3d at 456, "[t]he principles derived from *City of Newport* are directly applicable to" Section 504 of the Rehabilitation Act and Section 202 of the ADA. In determining whether Congress intended to allow punitive damages against municipalities under these statutes, as well as whether such damages are "appropriate" within the meaning of *Franklin*, the Eighth Circuit should have taken into account the long history and compelling policy rationales described in *City of Newport*. Moreover, it should have asked whether there was any evidence of congressional intent to depart *not* from *Franklin*'s general rule concerning the availability of all appropriate relief, but rather from the general immunity enjoyed by municipalities. *County of Centre*, 242 F.3d at 456. Its failure to do so was error. That error is further confirmed, moreover, by the 1991 Act's exemption of municipalities and other government entities from punitive liability under other provisions of the Rehabilitation Act and the ADA.[13]

d. In *Gebser*, this Court reasoned that the "implied damages remedy" under Title IX "should be fashioned along the same lines" as the statute's "express remedial scheme," which

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[13] In the Eighth Circuit, petitioners maintained that the Board was an "arm of the state" and thus entitled to Eleventh Amendment immunity. The court of appeals, however, rejected that submission. App., *infra*, 5a-8a. As this case comes to the Court, therefore, it can be assumed that the Board is, in essence, a municipal entity.

allows for suspension or termination of federal funding. 524 U.S. at 290. In this case, in contrast, the Eighth Circuit read *Franklin* as barring any inference that could be drawn about the availability of punitive damages from Congress's inclusion of administrative remedies to guard against fund recipients' violations of the Section 504 of the Rehabilitation Act or Section 202 of the ADA. App., *infra*, 10a n.6 (under *Franklin*, "administrative and private causes of action" must be treated as "separate and distinct"). That, too, was error.

Had the Eighth Circuit examined the "express remedial scheme" applicable to Section 504 of the Rehabilitation Act, it would have concluded – as the Sixth Circuit did in *Moreno* – that "Congress has chosen other ways to 'punish' those who violate § 504." 99 F.3d at 791. In particular, "a punishment of cutoff of federal funds is one of the remedies available" under the statute." *Singh* v. *Superintending Sch. Comm.*, 601 F. Supp. 865, 867 (D. Maine 1985) (citing this as a ground for disallowing punitive damages in case brought under Title VI); see also *Moreno*, 99 F.3d at 791-92; *DeLeo* v. *City of Stamford*, 919 F. Supp 70, 74 n.7 (D. Conn. 1995). Indeed, one reason for this Court's recognition under Title IX of a private right of action was to provide an alternative to the "severe" remedy of funding termination. See *Cannon* v. *University of Chicago*, 441 U.S. 677, 704-05 (1979); see also *Doe* v. *Oyster River Co-op. School Dist.*, 992 F. Supp. 467, 482-83 (D.N.H. 1997) (surveying legislative history of Title IX and identifying evidence that "Congress was leery of giving private litigants the power to threaten grant recipients with large, punitive sanctions").

e. Finally, in enacting Section 504 of the Rehabilitation Act, Congress acted pursuant to its Spending Clause powers. "[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State School and Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). To "enable the States to exercise their choice knowingly, cognizant of the consequences of their participation," this Court

has "insist[ed] that Congress speak with a clear voice" when imposing conditions on the receipt of federal funds. *Ibid.* Moreover, this Court made clear in *Gebser* that the "contractual nature" of Spending Clause statutes "has implications for our construction of the scope of the available remedies." 524 U.S. at 287. Because the common law generally does not recognize punitive damages as remedy for breach of contract, see RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981), it is doubtful that punitive damages should *ever* be awarded as a remedy in cases involving Spending Clause legislation. At a minimum, courts should require an unequivocal statement of congressional intent before allowing such a remedy. This the Eighth Circuit failed to do.[14]

Taken together, these serious errors in the Eighth Circuit's analysis provide further reason why this Court should accept the court of appeals' invitation "to inject additional clarity into this area" of law. App., *infra*, 16a. And there is no good reason not to accept that invitation *now*. The fact that the court of appeals remanded to the district with instructions to determine whether the punitive damages award was "appropriate" in this "specific case" (*ibid.*) is no reason to delay review of this long-running case, which has already taken three trips to the Eighth Circuit. See *id.* at 2a, 39a & n.4; *Gorman* v. *Bartch*, 123 F.3d 1126 (8th Cir. 1997); see also *Foust*, 442 U.S. at 45 (exercising review to decide analogous issue despite court of appeals' remand for excessiveness review). Moreover, the panel squarely rejected the argument that punitive damages are unavailable as a matter of law in implied actions brought under

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[14]It is especially difficult, moreover, to see how petitioners could have understood in 1992 that a condition placed on the Board's receipt of federal funds was the potential liability for punitive damages, since (1) it was "not until 1994" (several years after respondent's arrest) that there was even "a single case where punitive damages were awarded under § 504" (*Moreno*, 99 F.3d at 790), and (2) it was unclear that the relevant statutes even applied in this situation, as the court of appeals explained in upholding qualified immunity in a prior appeal (App., *infra*, 46a-50a).

Section 504 of the Rehabilitation Act and Section 202 of the ADA; and it gave the word "appropriate" an unduly narrow (and in our view incorrect) interpretation that will govern any remand proceedings and limit petitioners' ability to demonstrate inappropriateness. Because the important and clear-cut legal issues decided by the panel are fundamental to the conduct of any future proceedings on remand – and because they will continue to have sweeping implications for a wide array of other cases, *regardless* of the outcome of this particular dispute – review should not be delayed. See *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947); *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOVEMBER 2001

APPENDICES

APPENDIX A

United States Court of Appeals
for the Eighth Circuit

No. 00-1029/00-1030

Jeffrey Gorman, Appellant/Cross-Appellee,

v.

Richard Easley, in his official capacity as Chief of Police of the Kansas City, Missouri Police Department; Dr. Stacey Daniels-Young, in her official capacity as member of the Board of Police Commissioners of Kansas City, Missouri; Jeffrey J. Simon, in his official capacity as member of the Board of Police Commissioners of Kansas City, Missouri; Joseph J. Mulvihill, in his official capacity as member of the Board of Police Commissioners of Kansas City, Missouri; Dennis C. Eckhold, in his official capacity as member of the Board of Police Commissioners of Kansas City, Missouri; Kay Barnes, in her official capacity as member of the Board of Police Commissioners of Kansas City, Missouri; Neil Becker, in his official capacity as a member of the Kansas City Police Department, Appellees/Cross-Appellants.

Appeal from the United States District Court
for the Western District of Missouri

Submitted: January 8, 2001
Filed: June 13, 2001

Before BEAM, MORRIS SHEPPARD ARNOLD, Circuit Judges and ALSOP,[1] District Judge.

BEAM, Circuit Judge.

We have twice before heard appeals in this case. It has now been tried before a jury, which rendered a verdict against the defendant appellees (collectively "the Police Board" or "the Board"). Jeffrey Gorman now appeals the district court's post-trial ruling that punitive damages are not available under the Rehabilitation Act and the Americans with Disability Act. The Board, for its part, asserts Eleventh Amendment immunity, and appeals various trial court rulings. We reverse and remand for further proceedings.

I.

A January 1988 auto accident left Jeffrey Gorman a paraplegic. He lacks voluntary control over his lower torso and legs, including his bladder. His inability to steady himself with his abdominal muscles and legs confines him to a wheelchair specially designed to keep him upright. He must also wear a catheter attached to a urine bag around his waist, which must be emptied in order to prevent urine from backing up into his body and causing an infection or a kidney disorder.

One Saturday night in May 1992, Gorman and a friend were in the Westport area of Kansas City, Missouri, where they entered a dance club called "Guitars and Cadillacs." While in the club, the two became involved in an altercation with a bouncer, which ultimately resulted in Gorman's forceful ejection from the premises. Outside, Gorman approached several police officers, hoping they would intercede on his

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[1] The Honorable Donald D. Alsop, United States District Judge for the District of Minnesota, sitting by designation.

behalf. In fact, the officers were off-duty and working as private security for Westport. The officers told Gorman that he had to leave. When he refused, they placed him under arrest for trespass.

While waiting for the police van, Gorman told the officers that he had to go to the restroom to empty his full urine bag, but was told to wait until he got to the station. When the van arrived it lacked wheelchair locks, which would have permitted Gorman's transportation in his chair. Rather, it contained only a narrow bench. Gorman told the officers that he could not possibly ride in it. Given his inability to stay upright without his wheelchair, Gorman thought he would fall from the bench. Gorman testified that he told the officers this, that he told them how to lift him from his chair, and that he needed his molded cushion. Regardless, the officers placed Gorman on the bench and used a seatbelt to strap him in. The seatbelt did not properly hold Gorman upright, and it lay across his already full urine bag. Gorman testified that after he complained about the seatbelt, the officers loosened it, and used Gorman's own belt to strap him to the mesh behind the bench in order to hold him upright. The officers were unable to fold the wheelchair, and placed it, unfolded, in the back of the van.[2]

Officer Becker, the van driver and only on-duty officer involved, then drove the van away from the scene. Gorman testified that his body swayed with every turn and acceleration. Gorman admitted that he released his seatbelt out of concern over the pressure it was placing on his urine bag. Eventually, the other belt also came undone and Gorman fell to the van floor. The impact from the fall exploded Gorman's urine bag,

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[2] Almost every element of what happened that night was contested by the defendants, whose testimony was that Gorman did not instruct the officers how to transport him, offered no input whatsoever, and was thoroughly drunk and belligerent. As Gorman prevailed below, we present his version of events.

soaking him with his own urine. Noticing that Gorman had fallen, Officer Becker stopped the van. Unable to lift Gorman by himself, Officer Becker tied him to a support in the back of the van for the duration of the trip. The trip also damaged the wheelchair. After arriving at the station, Gorman was booked, processed and released. He was subsequently convicted of misdemeanor trespass.

After these events, Gorman began having medical difficulties. He suffered a bladder infection from urine backing up into his system and began suffering serious lower back pain. Whereas prior to that night he had been active and pain-free, his injuries left him unable to work a full day, suffering frequent pain, uncontrollable spasms in his paralyzed areas, and shoulder problems. Expert testimony suggested that these injuries and the resulting pain are permanent.

Gorman sued the Police Board under Title V, section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("section 504"), and Title II, section 202 of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132 ("section 202"). Section 504 prohibits disability-based discrimination in any public program receiving federal funds. Section 202 more generally prohibits disability-based discrimination in any public program or services regardless of the receipt of federal funds. In *Gorman* v. *Bartch*, 152 F.3d 907, 912-13 (8th Cir.1998), we held that despite Gorman's involuntary participation in the public services provided to detainees, he could pursue his claim under sections 504 and 202. After a trial, a jury found the defendants liable and awarded Gorman actual damages of $1,034,817.33 and punitive damages of $1,200,000.[3] This appeal followed.

[3] The district court submitted Gorman's ADA and Rehabilitation Act claims in a unified instruction. Gorman can therefore prevail if the evidence supports the jury's finding under either Act.

II.

We begin with the Police Board's claim of sovereign immunity. The Board interposes as dispositive our holding in *Alsbrook* v. *City of Maumelle*, 184 F.3d 999 (8th Cir.1999), *cert. denied sub nom., Alsbrook* v. *Arkansas*, 529 U.S. 1001, 120 S.Ct. 1265, 146 L.Ed.2d 215 (2000), that the Eleventh Amendment bars suits against the states in federal court under section 202. Gorman argues the Police Board's failure to similarly address his section 504 claim renders that argument moot. However, the Eleventh Amendment implicates our jurisdiction, which we are obliged to explore even where the parties fail to do so. *Long* v. *Bureau of Reclamation*, 236 F.3d 910, 916 (8th Cir.2001). We are therefore bound to consider whether sovereign immunity prevents Gorman from bringing a claim against the Police Board under either statute. *Alsbrook* alone does not dispose of that issue, for it leaves us with two questions: whether sovereign immunity similarly bars suits against a state in federal court under section 504; and whether the Police Board constitutes an arm of the state entitled to sovereign immunity. Because we resolve the latter question in the negative, we do not reach the former.

Sovereign immunity extends to states and "arms" of the state, but not to local governments. *Alden* v. *Maine*, 527 U.S. 706, 756, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999); *Merrill Lynch, Pierce, Fenner and Smith, Inc.* v. *Nixon*, 210 F.3d 814, 819 (8th Cir.), *cert. denied*, 531 U.S. 958, 121 S.Ct. 383, 148 L.Ed.2d 295 (2000). Whether an entity constitutes such an "arm" turns on its relationship to the state under state law.[4]

[4] Gorman argues that the denial of Eleventh Amendment immunity to bi-state agencies organized under federal law in *Hess* v. *Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 38 & n. 8, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994), undercuts the Police Board's claim to immunity as a creature of state law. This argument could not be more wrong. Organization under state law, rather than federal law, makes it more likely that an

Regents of the Univ. of Cal. v. *Doe*, 519 U.S. 425, 430-31 & n. 5, 117 S.Ct. 900, 137 L.Ed.2d 55 (1997); *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 280, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

In our own "arm of the state" jurisprudence, we have looked generally to three factors: (1) an agency's powers and characteristics under state law; (2) an agency's relationship to the state – its autonomy from the state and degree of control over its own affairs, and (3) whether any award would flow from the state treasury. *Treleven* v. *University of Minn.*, 73 F.3d 816, 818 (8th Cir.1996); *accord Hadley* v. *North Ark. Cmty. Tech. Coll.*, 76 F.3d 1437 (8th Cir.1996) (finding community college to be an arm of the state based upon the state's ultimate financial liability and the institution's status under state law); *Greenwood* v. *Ross*, 778 F.2d 448 (8th Cir.1985) (directing inquiry to degree of local autonomy and control and whether suit will draw payment from the state treasury). Because a state may only waive its immunity upon an "unequivocally expressed ... clear declaration" of an intent to do so, we give particular heed to a state's treatment of its subdivisions under its own laws. *College Savs. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999) (citations omitted). Likewise, we give substantial weight to whether litigation against a particular entity would draw on the public fisc. *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 38, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994); *Regents*, 519 U.S. at 430, 117 S.Ct. 900.

Our resolution of this issue in this case is guided by two holdings. The first is the Supreme Court's ruling in *Auer* v. *Robbins*, 519 U.S. 452, 456 n. 1, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997), that the St. Louis Board of Police is not "an arm of the state." There, the Court noted that "[w]hile the Governor appoints four of the board's five members, the city of St. Louis

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agency is an arm of the state.

is responsible for the board's financial liabilities, and the board is not subject to the State's direction or control in any other respect. It is therefore not an 'arm of the State' for Eleventh Amendment purposes." *Id.* (citations omitted).

The elements relied upon by the Supreme Court in *Auer* were recently reaffirmed in *Smith* v. *Missouri*, No. W.D. 58882, 2001 WL 471937, at 1 (Mo.Ct.App. May 7, 2001), where the Missouri Court of Appeals addressed the question whether members of the St. Louis Police Board and police officers with the City of St. Louis were entitled to coverage under the Missouri State Legal Expense Fund. That fund makes money available for payment of damages levied against any state agency or officer or employee thereof. *Id.* at 2. The court undertook a rigorous analysis of the St. Louis Board of Police in order to determine whether it was the sort of state agency the creators of the Legal Expense Fund had intended to include under its coverage. The court noted that the Board is a creature of state, and not local law. *Id.* at 4. Moreover, it noted that the Board was intentionally set up to be above local political influence, and to that end, as the Supreme Court noted, four of the Board's five members are appointed by the Missouri Governor. *Id.* at 3-4. However, the court went on to note that the State's funding mechanism ensures that the St. Louis Board is funded by the people of St. Louis. *Id.* at 5-6. Finally, the court examined the St. Louis Board's functions and purpose, which relate primarily to the city.[5] In particular, the court noted that the state has no day-to-day control over the St. Louis Board. *Id.* at 7-8. In sum, the Missouri Court of Appeals concluded that at best, the St. Louis Board is a "hybrid agency." *Id.* at 6-8. As regards the Legal Expense Fund, the court concluded that "the legislature's intent in creating and maintaining the Fund is to provide coverage to those agencies and employees whose

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[5] A geographically-limited scope of responsibility does not necessarily deprive an entity of Eleventh Amendment immunity. *See, e.g., Power* v. *Summers*, 226 F.3d 815, 818 (7th Cir. 2000).

duties and actions directly impact the whole state and over which the state retains more direct control." *Id.* at 8. The St. Louis Board not being such an entity, the court concluded the state has no obligation to pay judgments against its members or officers. *Id.* at 11.

The Kansas City Board, at issue in this case, is similarly a creature of Missouri state law, and is managed in a substantially similar manner. Mo. Ann. Stat. §§ 84.350-84.870. Its functions are primarily local. Its structure mirrors that which the Supreme Court found in *Auer* to not be an arm of the state. Moreover, as the Missouri Court of Appeals confirmed in *Smith*, and as the Supreme Court stated in *Auer*, Board members are not subject to reimbursement from the state treasury for any money judgments rendered against them. Because for the purposes at issue in this case relevant state law treats entities such as the Board as not being a state agency, and because the state is not responsible for judgments against it, we conclude that the Kansas City Board does not constitute an arm of the state for purposes of Eleventh Amendment immunity.

III.

Gorman appeals the district court's post-trial ruling that neither section 504 nor section 202 permits punitive damages. We have twice permitted monetary remedies under section 504, *Rodgers* v. *Magnet Cove Pub. Schs.*, 34 F.3d 642 (8th Cir.1994); *Miener* v. *Missouri*, 673 F.2d 969 (8th Cir.1982), but the availability of punitive damages remains an open question, *Gorman* v. *Bartch*, 152 F.3d 907, 910 n.2 (8th Cir.1998). This raises a question that only one other circuit has addressed. *See Moreno* v. *Consolidated Rail Corp.*, 99 F.3d 782 (6th Cir.1996) (holding that punitive damages are not available under section 504). While we are sympathetic to the Sixth Circuit's conclusion, we find it foreclosed by controlling precedent.

Sections 504 and 202 both borrow their remedies from Title VI of the 1964 Civil Rights Act. 29 U.S.C. § 794a(a)(2); 42 U.S.C. § 12133. The pertinent question, therefore, is what remedies Title VI permits. Unfortunately, Title VI expressly provides neither a private cause of action nor remedies for such an action. *See* 42 U.S.C. §§ 2000d *et seq.* In *Cannon* v. *University of Chicago*, 441 U.S. 677, 694-703, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), however, the Supreme Court held that Title IX of the Education Amendments of 1972 created an implied cause of action in its protected class. In doing so, the Supreme Court relied heavily on the fact that Title IX had been modeled on Title VI. The Court assumed Congress knew that Title VI had been interpreted by some lower courts to contain an implied cause of action. *Id.* at 696-97, 99 S.Ct. 1946. Therefore, the Court concluded, Congress must have intended Title IX to similarly include an implied cause of action. This reading has since been turned around to conclude that Title VI must also contain an implied cause of action. *Lane* v. *Pena*, 518 U.S. 187, 191, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996); *Guardians Ass'n* v. *Civil Serv. Comm'n*, 463 U.S. 582, 597, 612, 615-16, 635-36, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983) (seven members of the court recognizing implied action in Title VI in fragmented opinions). For our part, we have twice permitted damages under section 504, thereby corroborating, albeit without discussion, the notion that Title VI contains an implied cause of action. *Rodgers*, 34 F.3d 642; *Miener*, 673 F.2d 969.

We turn next to *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992), which considered the remedies available under the cause of action implied in Title IX. There, the Court affirmed the rule, articulated earlier in *Bell* v. *Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 90 L.Ed. 939 (1946), that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Franklin*, 503 U.S. at 70-

71, 112 S.Ct. 1028. The Supreme Court has long made clear that punitive damages are an integral part of the common law tradition and the judicial arsenal. *See Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 15-18, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) (reviewing history of punitive damages from Blackstone through the English and American courts); *Day* v. *Woodworth*, 54 U.S. (13 How.) 363, 370, 14 L.Ed. 181 (1852) (noting well established common law principle that juries may exact "exemplary, punitive or vindictive" damages). Punitive damages, therefore, fall within the panoply of remedies usually available to American courts. Given an implied cause of action in Title VI, *Franklin* compels the conclusion that absent express congressional statement to the contrary, Title VI also affords all appropriate remedies, including punitive damages.[6]

The Court in *Franklin* next took up "whether Congress intended to limit application of this general principle in the enforcement of Title IX." 503 U.S. at 71, 112 S.Ct. 1028. Because the cause of action in question was implied rather than expressed, the Court put aside what it considered a pointless discussion of legislative history.[7] *Id.* Rather, it looked to the judicial backdrop against which Congress had legislated. The

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[6] The availability of additional remedies is not precluded by Congress' express provision in Title VI of administrative remedies. It is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. *Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis*, 444 U.S. 11, 19, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979). However, Title IX uses the same textual structure and remedies, yet in *Franklin* the Court found the implied private cause of action to sustain an award of monetary damages. This follows only if the administrative and private causes of action are separate and distinct such that a limitation on one does not operate against the other.

[7] That the cause of action was implied did not preclude the availability of remedies as the latter is analytically distinct from the question of whether a cause of action exists at all. *Franklin*, 503 U.S. at 65-66, 112 S.Ct. 1028.

Court observed that "[i]n the years before and after Congress enacted this statute, the Court followed a common-law tradition and regarded the denial of a remedy as the exception rather than the rule." *Id.* (quotation and brackets omitted). Once again indulging the assumption that Congress legislates in light of prevailing precedent, the Court found Congress to have intended the availability of all remedies. The Court then reviewed Congress' subsequent treatment of Title IX. In both 1986 and 1987, Congress amended Title IX without disturbing either the Court's holding in *Cannon*, that Title IX afforded a private remedy, or limiting the availability of remedies thereunder. In fact, the language of the 1986 amendment impliedly recognized the existence of a private cause of action. *Id.* at 72-73, 112 S.Ct. 1028. The Court concluded, "[o]ur reading of the two amendments to Title IX enacted after *Cannon* leads us to conclude that Congress did not intend to limit the remedies available in a suit brought under Title IX." *Id.* at 72, 112 S.Ct. 1028.

Application of *Franklin*'s methodology to this case must begin with the enactment of Title VI in 1964. *Cannon* and our own holdings in *Rodgers* and *Miener* compel the conclusion that in 1964 Congress created an implied cause of action in Title VI.[8] At that time, the rule in *Bell*, relied on in *Franklin*, that a cause of action affords all appropriate remedies unless expressly limited, was alive and well. As in *Franklin*, we must therefore conclude that Congress assumed the availability of all remedies, including punitive damages, under Title VI. Congress has not

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[8] When a court "implies" a cause of action it does not "create" it, but rather "discovers" it in an act of statutory construction. *See, e.g., Franklin*, 503 U.S. 71-72, 112 S.Ct. 1028; *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 430-31, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964). The upshot of this understanding is that the cause of action has always existed, despite having lain dormant. This logic holds for any judicial statutory interpretation — even those which change pre-existing interpretations. Regardless of the merits of this understanding, it flows from our judicial interpretive, as opposed to legislative, function.

since amended Title VI to limit any cause of action implied thereunder, nor the remedies that might accompany such a cause of action. Congress extended the remedies available under Title VI to section 504 in 1978, 29 U.S.C. § 794a, and then to section 202 in 1990, 42 U.S.C. § 12133. Congress has never expressly limited the remedies available under those sections either. Therefore, logic dictates, the full panoply of remedies available under Title VI, including punitive damages, must be available under sections 504 and 202.

The Sixth Circuit reached the contrary conclusion in *Moreno*, 99 F.3d 782. It relied largely on two concerns. First, it noted that since the enactment of these various sections, lower federal courts have been in near unanimity that they do not support punitive awards. *Id.* at 789-91. Second, given this fact, it pointed to the Civil Rights Act of 1991 as proof that Congress itself did not intend the availability of punitive damages. *Id.* at 790. It additionally pointed to this same evidence to support the proposition that punitive damages would not be "appropriate" in that case. *Id.* at 791- 92.

We are sympathetic to the Sixth Circuit's concerns, but find its methodology and conclusions foreclosed by *Cannon* and *Franklin*. The Sixth Circuit first pointed to the 1986, 1987 and 1991 amendments to the Rehabilitation Act and the ADA, wherein Congress amended these acts but did not disturb decisions ruling punitive damages unavailable under sections 504 and 202. Noting the assumption, made in *Franklin* and *Cannon*, that Congress legislates in light of then-prevailing judicial interpretations, the Sixth Circuit concluded "[t]he only inference of congressional intent that can be drawn from [the amendments] is that Congress intended § 504 remedies to remain *in statu quo – i.e.,* no punitive damages." *Id.* at 791.

This reasoning, however, misapplies the Supreme Court's methodology in *Franklin* and also undermines basic principles of statutory construction. *Franklin* first requires the determination of what remedies a statutory cause of action afforded at its enactment. It then permits reference to subsequent amendments only to see whether Congress later altered that initial understanding. This comports with the general rule that a statute adopts its meaning at the time of its enactment, and not at some later point by negative inference. In this case, because sections 504 and 202 draw their remedies from Title VI, the inquiry must start with the enactment of Title VI in 1964. As discussed above, *Cannon* and *Franklin* compel the conclusion that punitive damages were available as a remedy to a private cause of action under Title VI in 1964, and it is that assumption which provides the baseline against which subsequent amendments must be gauged. Therefore, the 1986, 1987 and 1991 amendments must be read as having not affected the status quo – that punitive damages are available under sections 504 and 202. To draw a contrary conclusion from those amendments would be to hold that Congress' understanding of section 504 in 1986 and 1987, and its understanding of sections 504 and 202 in 1991 trumped Congress' intent regarding those statutes when they were originally enacted, and in this way retroactively amended them. *See Brown & Williamson Tobacco Corp.* v. *FDA.*, 153 F.3d 155, 167 (4th Cir.1998) (noting that a statute's intent at the time of its enactment governs over subsequent congressional understandings) (citing *MCI Telecomm. Corp.* v. *AT & T*, 512 U.S. 218, 222, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994)), *aff'd.* 529 U.S. 120, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000).

Despite our conclusion, the Sixth Circuit's concerns are hardly misplaced. When Congress enacted the Rehabilitation Act and at the time of the subsequent amendments, courts generally agreed Title VI and section 504 did not afford monetary damages, and were in near unanimity that they did not

permit punitive damages.[9] However, the governing statutes and precedents in this case operate as a one-way ratchet: once a cause of action is discovered, it automatically entitles a plaintiff to all appropriate remedies; and that finding then extends those remedies to all other interrelated statutes. This now precludes consideration of what Congress intended through consideration of these earlier court decisions.

This tension becomes particularly clear in the context of the 1991 Civil Rights Act. The product of extensive compromise between President George Herbert Walker Bush and Congress, that Act amended the ADA and the Rehabilitation Act to permit limited punitive damages.

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[9] *See, e.g., Americans Disabled for Accessible Pub. Transp.* v. *SkyWest Airlines, Inc.*, 762 F.Supp. 320 (D.Utah 1991) (finding no punitive or compensatory damage remedy under section 504); *Doe* v. *Southeastern Univ.*, 732 F.Supp. 7 (D.D.C.1990) (limiting section 504 to equitable remedies); *Robinson* v. *University of Pa.*, No. 87-2476, 1988 WL 120738 (E.D.Pa. Nov.8, 1988) (holding neither punitive nor compensatory damages available under Title VI); *Singh* v. *Superintending Sch. Comm.*, 601 F.Supp. 865 (D.Maine 1985) (permitting compensatory remedy but not punitive remedy under Title VI); *Moreno* v. *Texas S. Univ.*, 573 F.Supp. 73 (S.D.Tex.1983) (finding no private cause of action for compensatory or punitive damages under Title VI); *Rendon* v. *Utah State Dep't of Employment Sec. Job Serv.*, 454 F.Supp. 534 (D.Utah 1978) (same). *But see Neighborhood Action Coalition* v. *City of Canton*, 882 F.2d 1012 (6th Cir.1989) (permitting Title VI action for compensatory and punitive damages to continue without addressing their availability); *Hutchings* v. *Erie City & County Library Bd. of Directors*, 516 F.Supp. 1265 (W.D.Pa.1981) (permitting damages remedies under section 504 in suit where plaintiff sought punitive damages); *Patton* v. *Dumpson*, 498 F.Supp. 933 (S.D.N.Y.1980) (finding section 504 to afford compensatory damages); *Gilliam* v. *City of Omaha*, 388 F.Supp. 842 (D.Neb.1975) (recognizing action for monetary damages under Title VI), *aff'd on other grounds*, 524 F.2d 1013 (8th Cir.1975). Since *Franklin*, courts have begun to re-evaluate these holdings. *See, e.g., Burns-Vidlak* v. *Chandler*, 980 F.Supp. 1144 (D.Haw.1997) (finding punitive and compensatory damages available under sections 504 and 202).

Specifically, it permitted employees suing under section 107(a) of the ADA and section 501 of the Rehabilitation Act to recover compensatory and punitive damages subject to statutory caps ranging from $50,000 to $300,000. 42 U.S.C. § 1981a. It did not, however, affect sections 504 or 202. The text and history of the 1991 Act suggest Congress intended to expand, and not to contract, the available remedies. Congress provided that a "complaining party may recover compensatory and punitive damages," using broadening, and not limiting language. 42 U.S.C. § 1981a(a)(2). Legislative history corroborates this interpretation. *See, e.g.*, H.R.Rep. No. 102-40(I & II) (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 673 (discussing punitive damage provisions as an expansion of remedies). The following year, those who had pushed for the inclusion of punitive damages in the 1991 Act introduced a bill to remove its damages caps. The proposed bill would have deleted 42 U.S.C. § 1981a(b)(3), which contains the caps, but would not have removed the language authorizing punitive and compensatory damages, suggesting that even then, they considered the new language necessary to create a punitive damage remedy under the acts. *See* Equal Remedies Act, S.Rep. No. 102-286 (1992), 1992 WL 113471 (Leg.Hist.); *see also Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 534, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999) ("With the passage of the 1991 Act, Congress provided for additional remedies, including punitive damages, for certain classes of ... violations.").

Applying the Supreme Court's reasoning in *Franklin* turns this understanding on its head. *Cannon, Rodgers* and *Miener* postulate the creation of a private cause of action in Title VI in 1964. Under *Franklin* we are to assume that action to have provided all remedies. Absent any subsequent contrary instruction, we are to assume those remedies to remain available under sections 504 and 202 today. We therefore rule, albeit not with great satisfaction, that these sections permit an award of punitive damages. Perhaps our parting ways with our sister

circuit will prompt the Supreme Court or Congress to inject additional clarity into this area.

Our analysis thus far does not entirely conclude this matter, as an award of damages must be "appropriate" in a specific case.[10] District courts must undertake an independent review of the evidence to determine whether it supports punitive damages. *Grabinski* v. *Blue Springs Ford Sales, Inc.*, 203 F.3d 1024, 1025 (8th Cir.), *cert. denied,* 531 U.S. 825, 121 S.Ct. 70, 148 L.Ed.2d 35 (2000); *accord Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal Inc.*, 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989). The defendant's conduct must be shown to have been "motivated by evil motive or intent, or ... reckless or callous indifference to the federally protected rights of others." *Smith* v. *Wade*, 461 U.S. 30, 56, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983); *see also Kolstad*, 527 U.S. 526, 119 S.Ct. 2118, 144 L.Ed.2d 494 (discussing punitive damages scheme under 42 U.S.C. § 1981a). Punitive damages may also not be excessive. *Watkins* v. *Lundell*, 169 F.3d 540, 545 (8th Cir.), *cert. denied,* 528 U.S. 928, 120 S.Ct. 324, 145 L.Ed.2d 253 (1999). We have a subsequent obligation to review the district court's finding. At oral argument, Gorman's counsel admitted this to be the case and conceded that the district court did not do so, as it found punitive damages precluded as a matter of law. The facts in this case were hotly contested. We therefore remand for consideration of this point.

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[10] The *Moreno* court also argued that given the legislative and judicial backdrop, punitive damages were not "appropriate" as required by *Franklin*. *Moreno*, 99 F.3d at 791-92. We do not think the word "appropriate" to have been writ so large, and do not think the Court intended to create an escape hatch for all foregoing judicial interpretations. In his concurring opinion, Justice Scalia opined that given an action's implied nature, implied limitations on remedies ought also be considered. *Franklin*, 503 U.S. at 77-78 (Scalia, J. concurring in the judgment). Justice Scalia's comments underscore the breadth of the Court's holding.

IV.

The Police Board next appeals whether Gorman is a qualified individual with a disability under the ADA. The Police Board argues that while at the time of trial, our law clearly established that disability should be gauged without reference to corrective devices, subsequent Supreme Court decisions have required an individualized assessment of disability including consideration of available corrective devices. *See, e.g., Murphy* v. *UPS, Inc.*, 527 U.S. 516, 119 S.Ct. 2133, 144 L.Ed.2d 484 (1999); *Sutton* v. *United Airlines, Inc.*, 527 U.S. 471, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999). It seeks a remand to litigate this issue.

This argument is well off the mark. In *Sutton*, the Court concluded that a person with severe myopia, whose vision could be corrected with eyeglasses to the point that the disability did not severely impede a major life activity was not a qualified individual. 527 U.S. at 481-83, 119 S.Ct. 2139. Gorman's wheelchair permits him some mobility, but hardly replaces his legs. Moreover, the events challenged in this lawsuit center largely on his removal from the wheelchair and placement in the back of a police van, where he had no corrective device. No corrective device — no issue. We see little need to further pursue this question.

V.

The Police Board next raises two challenges to the jury instructions. The Board asserts that the jury was not instructed as to each element of an action under sections 504 and 202, and also objects to an instruction that the Board had an obligation to provide "safe" transportation. A jury instruction must, when taken as a whole and viewed in light of the evidence and applicable law, fairly and adequately submit the issues in the case to the jury. *Horstmyer* v. *Black & Decker, (U.S.), Inc.*, 151 F.3d 765, 771 (8th Cir.1998). Where a party fails to object to an

instruction before the district court, we will review only for plain error. *Id.*

In instruction 16, the district court instructed the jury that liability would lie under the Rehabilitation Act and the ADA upon proof of all the following elements:

> **First,** that the defendants failed to provide plaintiff appropriate transportation that reasonably accommodated his disability after he was arrested, and
>
> **Second,** that as a direct result of the defendants' failure, plaintiff sustained damages.

The district court then instructed the jury in its instruction number 17 that "for purposes of Instruction No. 16, making a 'reasonable accommodation' for the plaintiff means making modifications to the defendants' practices for transporting the plaintiff after he was arrested so that he would be transported in a manner that was safe and appropriate consistent with his disability."

The Board failed to object at trial to the form of instruction 16, as given at trial. In fact, the Board agreed to its text and stated an intention to not object. We will therefore reverse only for plain error. We have previously held that in order to prevail under section 202, a plaintiff must prove that "1) he is a qualified individual with a disability; 2) he was ... denied the benefits of a public entity's services ...; and 3) that such ... denial... was by reason of his disability." *Layton* v. *Elder*, 143 F.3d 469, 472 (8th Cir.1998). Such language, however, is not sacrosanct. Rather, an instruction must fairly and accurately submit the issue in light of the evidence and the law. *Horstmyer*, 151 F.3d at 771. In this case, the court's instructions resulted from lengthy negotiations between the court and the parties during which the parties agreed to drop certain elements from the instructions. Moreover, the language

used fairly captures the elements of the actions. Section 202 requires reasonable transportation modifications if necessary. The court's instruction that damages flow from a failure to reasonably accommodate a disability implicitly requires a finding of denial and disability. The instruction similarly covers the essential elements of section 504. In light of the facts of this case and the language used, we sustain the instruction given.[11]

The Board also takes issue with the district court's use of the word "safe" in instruction 17 as an incorrect statement of the law, and expresses the fear that it required the Board to insure the safety of future detainees. The district court quoted the word "safe" from our prior opinion in this case. *See Gorman*, 152 F.3d at 913. We agree with the Police Board that in *Gorman* we did not impose an obligation of providing "safe" transportation. We also, however, do not think that the district court's instruction warrants the interpretation given it by the Police Board. The instruction required transportation safe and appropriate *consistent with Gorman's disability.* This seems the essence of a reasonable accommodation — the police cannot reasonably accommodate a disabled detainee by placing him in a position where, by virtue of his disability, he is left helpless. The district court did not require the Police Board to insure Gorman against other harms, such as a crash on the way to the station or a self-imposed injury. On this reading, we approve the instruction.

VI.

The Board also challenges the district court's denial of its motion for a new trial, on the basis that the verdict was against the weight of the evidence, along with various evidentiary rulings. After reviewing the record we affirm the district court on these points.

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[11] In the future, the district court should separate out instructions under different acts and more carefully parse elements, for clarity on appeal.

We remand to the district court for further proceedings consistent with this opinion.

APPENDIX B

[File-Stamp Omitted]

IN THE UNITED STATE DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

JEFFREY GORMAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 95-0475-CV-W-3
	)	
RICHARD D. EASLEY, et al.,	)	
	)	
Defendants.	)	

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW OR IN THE ALTERNATIVE FOR NEW TRIAL

I. INTRODUCTION

A jury returned a verdict in favor of Plaintiff on his claims under the Americans with Disabilities Act (the "ADA") and the Rehabilitation Act. The jury awarded Plaintiff (1) $42,566.33 for medical expenses, (2) $342,251.00 for lost past wages, (3) $500,000.00 for lost future wages, (4) $150,000 for pain and suffering, and (5) $1.2 million in punitive damages. Pending is Defendants' Motion for judgment as a Matter of Law or in the Alternative for New Trial. The Court agrees that punitive damages are not available as a matter of law under either the

ADA or the Rehabilitation Act, so the punitive damage award is vacated. Defendants' Motion is denied in all other respects.[12]

II. DISCUSSION

A. Standards

When considering a Motion for Judgment as a Matter of Law, the Court is not permitted to consider the credibility of witnesses and must consider the evidence in the light most favorable to the prevailing party. *E.g., Gardner* v. *Buerger*, 82 F.3d 248, 251 (8th Cir. 1996). The Motion can be granted only if the evidence "point[s] unswervingly to only one reasonable conclusion." *Id.* It can also be granted, as in this case, if the law does not permit the result reached by the jury.

The Court's discretion to grant a new trial is broader than that described above. "The district court may order a new trial where it is convinced that the verdict goes against the clear weight of the evidence or where a miscarriage of justice will result. While the district court's discretion is not boundless, it

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[12] During trial, the Court indicated its uncertainty as to whether future lost wages were to be determined by the jury or the Court and invited the parties to brief the issue in their post-trial motions. They did not do so.

The Eighth Circuit has interpreted the language of Title VII of the Civil Rights Act as directing that future lost wages are to be determined by the court and not the jury. *Newhouse* v. *McCormick & Co.*, 110 F.3d 635, 640 (8th Cir. 1997). As will be discussed in Part II.B of this Order, Plaintiff's remedies in this case are not based on Title VII of the Civil Rights Act so *Newhouse* is not directly on point. Moreover, there is no statutory language governing the remedies in this case, so there is no language to interpret.

Given that the parties have not raised the issue, the Court deems it inappropriate to reach a definitive ruling on the matter. Instead, the Court will simply enter a judgment for front pay based on the jury's findings.

can rely on its own reading of the evidence in determining whether the verdict goes against the clear weight of the evidence." *Mears* v. *Nationwide Mut. Ins. Co.*, 91 F.3d 1118, 1123 (8th Cir. 1996).

B. Availability of Punitive Damages

Defendants have raised a series of arguments that attack the award of punitive damages. The Court agrees with Defendants that punitive damages were not available as a matter of law, making it unnecessary to address Defendants' remaining arguments.

Plaintiff's ADA claim was brought pursuant to 42 U.S.C. § 12132, which appears in Subchapter II of the ADA and declares that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits. . . of a public entity, or be subjected to discrimination by such entity." The ADA specifies that the remedies found in section 794a of Title 29 are to be used in cases based on this provision. 42 U.S.C. § 12133. Section 794a of Title 29 sets forth the remedies available for violations of the Rehabilitation Act, so the remedies available to Plaintiff under the two statutory schemes is [sic] co-extensive.

Section 794a contains two provisions for remedies. Section 794(a)(1) applies in employment situations, so it does not apply in this case. Section 794(a)(2) applies to persons who have been "aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance. . ." and is the provision applicable to this case. Section 794a(a)(2) declares that the applicable remedies are those found in Title VI of the Civil Rights Act of 1964, which appears at 42 U.S.C. § 2000d. Unfortunately, the trail turns cold at this point because section 2000d does not provide for a private cause of action, much less set forth the remedies

available in private lawsuits. *See Moreno* v. *Consolidated Rail Corp.*, 99 F.3d 782, 788 (6th Cir. 1996) (en banc).

Nonetheless, all courts to consider the issue have held that a private right of action under the Rehabilitation Act does exist. *E.g.*, *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 630 (1984) (holding that back pay is recoverable under section 504); *see also Rogers* v. *Magnet Cove Pub. Schools*, 34 F.3d 642, 643-44 (8th Cir. 1994). The difficulty comes in determining precisely what remedies are available. Plaintiff contends that punitive damages must be available because the Eighth Circuit declared in *Rodgers* that "all legal and equitable remedies are available" under both Title VI of the Civil Rights Act and the Rehabilitation Act. 34 F.3d at 644-45. This Court does not agree with Plaintiff's conclusion that the issue has been decided. Close examination of the *Rodgers*' court's discussion reveals that the full range of legal and equitable remedies is available to "make good the wrong" or, in other words, to compensate plaintiffs for their injuries. Punitive damages do not "make good the wrong" but rather punish and deter. Contrary to Plaintiff's characterization of the case, *Rodgers* did not specifically discuss punitive damages. Finally, the Eighth Circuit does not think it has settled the issue; four years after *Rodgers* was decided it observed that "[t]his court has not addressed whether punitive damages are available under Title II of the ADA and § 504 [of the Rehabilitation Act] . . . ." *Gorman* v. *Bartch*, 152 F.3d 907, 910 n.2 (8th Cir. 1998).[13]

Plaintiff also finds support in *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), which addressed remedies available under Title IX of the Education Amendments of 1972. Once again, contrary to Plaintiff's characterization, *Franklin* did not specifically address the availability of punitive damages. *See Moreno*, 99 F.3d at 789 & n.3. Nonetheless, *Franklin* does

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[13] Section 504 of the Rehabilitation Act is codified at 29 U.S.C. § 794 and provides the basis for Plaintiff's Rehabilitation Act claim.

provide a framework for discussion of the issue in the present case – a framework that was employed by the Sixth Circuit and led that court to conclude that punitive damages are not available under the Rehabilitation Act. The Court is persuaded by the Sixth Circuit's reasoning and elects to follow it.

Having concluded that a private right of action exists, the first task is to determine whether there is a clear indication that Congress imposed limits on the scope of relief. *Franklin*, 503 U.S. at 71; *Moreno*, 99 F.3d at 789. "In this case, as in *Franklin*, the usual sources of legislative history — contemporaneous committee reports, floor debates and the like – are of little help, the cause of action having been created by the courts and not by Congress." *Moreno*, 99 F.3d at 789. Similarly, resort to the statutory language is unhelpful because there is not statutory language addressing the issue. In order to divine Congress' intent the Court must look to the state of the law at the time the Rehabilitation Act was passed and the course of events that followed its passage and determine whether any meaningful conclusions can be made. *Franklin*, 503 U.S. at 71-73; *Moreno*, 99 F.3d at 789-91.

Following the Supreme Court's decision in *Darrone* most courts held that punitive damages were not available under either section 504 of the Rehabilitation Act or under Title VI of the Civil Rights Act (which, as noted earlier, provides the Rehabilitation Act's remedies). *See Moreno*, 99 F.3d at 789-90 (discussing cases). It was against this backdrop of judicial decisions that Congress amended the Rehabilitation Act three times.

> In 1986 Congress passed the Civil Rights Equalization Act, 42 U.S.C. § 2000d-7(a), making the states subject to § 504 – and to Title IX, Title VI, and the Age Discrimination Act – to the same extent as private parties. In the following year Congress passed the Civil Rights Restoration Act, strengthening the protections of § 504 and

the other anti-discrimination provisions by overturning *Grove City College* v. *Bell*, 465 U.S. 555, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984). In neither of these pieces of legislation did Congress indicate any desire to change the established understanding that punitive damages were not available under § 504.

Four years after enacting the 1987 Civil Rights Act, Congress passed the Civil Rights Act of 1991. The 1991 Act was the result of an extensive legislative compromise between President Bush and Congress. Subject to a monetary cap that could not exceed $300,000, the new act made punitive damages available – for the first time – under § 501 of the Rehabilitation Act, Title VII of the Civil Rights Act of 1964, and the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213. The 1991 Act did not extend the new punitive damages provision to § 504.

Id. at 790 (footnote omitted).[14]

The Court draws the same conclusion from this sequence of events as did the Sixth Circuit. Congress did not specifically declare that punitive damages were available under section 504, and the courts considering the issue held that they were not available. With this judicial landscape in place Congress amended portions of the Rehabilitation Act three times

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[14] *Moreno's* statement that the Civil Rights Act of 1991 allowed for punitive damages under the ADA is broader than it should be. The 1991 Act amended and created a new variety of statutory provisions; the provision applicable to the ADA appears in the newly-created section 1981a of Title 42, which in subsection (b) declares that punitive damages area available in cases brought under section 12117(a) of Title 42. Section 12117(a) appears in Subchapter I of the ADA and applies solely to employment cases; the 1991 Act did not affect 42 U.S.C. § 12133, which applies the enforcement mechanism for cases arising under Subchapter II of the ADA – such as the case at bar.

(including section 504 twice) and the ADA once, but at no time did Congress take steps to alter the consensus of judicial decisions. "The only inference of congressional intent that can be drawn from the three pieces of legislation is that Congress intended § 504 remedies to remain in status quo – i.e., no punitive damages." *Id.* at 791 (footnote omitted).

C. Evidence Regarding Lack of Compliance Plan

During the trial, the jury heard evidence that Defendants did not have a plan for compliance with the Rehabilitation Act, which was required by the Act and its attendant regulations. Instruction No. 21 advised the jury that it could not consider this evidence in deciding whether Plaintiff's rights had been violated, but could consider the evidence "only to help you decide whether to award plaintiff punitive damages under Instruction No. 20." Defendants suggest that the jury ignored this limitation and supports this conclusion by reasoning that there was no other way the jury could have found in Plaintiff's favor. The Court disagrees. First, the law presumes that the jury will follow the jury instructions; the fact that Plaintiff won his case does not, of its own force, prove that the presumption is unwarranted in this instance. Moreover, there was evidence that, if believed by the jury, supported the verdict in Plaintiff's favor. At the risk of omitting important details in the interest of brevity, the Court notes that there was evidence demonstrating that Plaintiff told the officers how he could be safely transported and that his instructions were not heeded. There was evidence that Plaintiff was lifted from his chair and placed on a bench in the police van; his belt was removed and used to "support" him by wrapping the belt around Plaintiff's waist and attaching it to the mesh screen behind the bench. There was evidence permitting the jury to find that this method failed to properly support Plaintiff and that he was unable to maintain his balance. Plaintiff's inability to support himself, coupled with the force exerted upon the belt, caused the belt to break. Plaintiff was then left to literally bounce around in the van while he was

transported. In short, the Court holds that there was sufficient evidence to support the jury's verdict and there is no basis for concluding that the jury disobeyed Instruction No. 21.[15]

D. Evidentiary Issues

Defendants revisit a variety of evidentiary issues. These issues involve evidence of Plaintiff's prior history of intoxication the circumstances of the 1988 automobile accident that originally paralyzed Plaintiff. The Court will not delve into these matters in great detail, as the matters have been discussed in the Court's Order in Limine and on the record during trial. Briefly stated, evidence of intoxication at times other than the incident in question is not "habit" evidence as that concept is commonly understood, nor is it proper evidence of character. To the extent that the fact a person was intoxicated at some time unrelated to the present case bears on this character, the Court concludes that the inference is unduly prejudicial and is excludable under Rule 403 of the Federal Rules of Evidence. Finally, the court does not believe that intoxication at times other than the incident in question bears on credibility. Intoxication bears on credibility insofar as it bears on a witness' ability to perceive events, and Defendants were allowed to introduce evidence that Plaintiff was intoxicated on this occasion. The fact that he was intoxicated at times in the past was irrelevant.

Similarly, the circumstances of the 1988 accident – namely, that it resulted from his attempt to flee pursuing police officers – is also inappropriate character evidence and the probative value of the evidence is outweighed by the risk of improper prejudice. It also does not bear on credibility. Defendants seem to suggest that the fact he was fleeing from the

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[15] Because the award of punitive damages is vacated on other legal grounds, there is no need to consider whether evidence about the lack of a compliance plan was properly admissible on this issue.

police indicates bias on Plaintiff's part, but the Court believes that the evidence Defendants wished to introduce posed a substantial risk that the jury could consider the fact that Plaintiff had previously fled from the police in evaluating his veracity instead of considering the more subtle argument that Plaintiff blamed the police for his original paralyzing injury and therefore was biased against them. This would have been an improper basis for impeaching Plaintiff, so the risk of unfair prejudice outweighed the probative value of the evidence.

In their Motion Defendants identified another evidentiary issue they wanted the Court to consider: the prohibition on evidence that Plaintiff settled other claims with non-police officers. These claims related to a bar's decision to remove Plaintiff from his premises and involves events leading to his arrest. The issue is unreviewable at this juncture because Defendants' Suggestions in Support of their Motion (Doc. #181) makes no mention of the issue so the Court has not been presented with legal support for Defendant's position. The Court permitted Defendant to introduce evidence that the bar's personnel were responsible for Plaintiff's injuries, *see* April 2, 1999 Order in Limine, but the admissibility of Plaintiff's settlement on those claims is unclear and unestablished.

E. Instructional Error

Defendants contend the verdict director (Instruction No. 16) incorrectly stated his law in that it did not ask the jury to decide whether Plaintiff was a qualified individual with a disability. There was no doubt that Plaintiff was disabled within the meaning of the act, he was paralyzed and confined to a wheelchair. Cf. *Sutton* v. *United Air Lines, Inc.*, 119 S. Ct. 2139, 2149 (1999) ("individuals who use prosthetic limbs or wheelchairs may be mobile and capable of functioning in society but still be disabled because of a substantial limitation

on their ability to walk or run.").[16] The issue of whether he was a qualified person with a disability was answered by the Eighth Circuit in the fist appeal in this case. *Gorman*, 152 F.3d at 912-13. Finally, the Court's notes reflect that after the noon recess on the third day of trial (April 7, 1999) Defendants' counsel agreed that the issue did not need to be included in the jury instructions.

Defendants also contend that the use of both Instruction No. 16 and Instruction No. 17 was confusing and inconsistent. The Court disagrees. Instruction No. 16 contained, as the first element, "that the defendants failed to provide plaintiff appropriate accommodation that reasonably accommodated his disability after he was arrested." Instruction No. 17 states as follows:

> For purposes of Instruction No. 16, making a "reasonable accommodation" for the plaintiff means making modifications to the defendants' practices for transporting the plaintiff after he was arrested so that he would be transported in a manner that was safe and appropriate consistent with his disability.
>
> In deciding whether any accommodations were reasonable, you should consider all the facts and circumstances surrounding the events of May 31, 1992.

[16] This also addresses Defendants' suggestion, raised in their Supplemented and Renewed Motion for Judgment as a Matter of Law or in the Alternative Motion for New Trial, that Plaintiff was not a "disabled" within the meaning of the ADA or the Rehabilitation Act. There was no serious dispute on this issue at trial.

Instruction No. 17 is a definitional instruction; the fact that it uses words different than those used in Instruction No. 16 is to be expected and is not fatal.[17]

Defendants' remaining arguments about the content of Instruction No. 16 were addressed on the record during trial and need not be addressed again. In this regard, the Court wishes to briefly address one issue; namely, the failure to specifically instruct the jury that it could find for Plaintiff only if it found the Defendants discriminated against him based on his disability. The Court's notes from the discussion held on the fourth day of trial (April 8, 1999) reflect that the discussion about the director focused upon Plaintiff's ability to elect to pursue a claim based on either (1) discrimination based on handicap or (2) failure to accommodate his handicap. It was agreed that Plaintiff could pursue either legal theory, and it was quite clear that Plaintiff elected the latter course. Once Plaintiff made this election the conversation focused on the proper manner for instructing the jury about Defendants' obligation to provide reasonable accommodation, but at no time did Defendants suggest that the proper method required discrimination-type language. Thus, the Court does believe that (1) Defendants are incorrect as a matter of law based on Plaintiff's chosen legal theory, and (2) Defendants did not raise the issue.

F. Sufficiency of the Evidence

Defendants argue that there was insufficient evidence to support the verdict, but offer no real explanations as to why this conclusion should be credited. Other than speculating on the effect of the evidence about the lack of a compliance plan (see Part II.C, above), Defendants offer no arguments in support.

[17] The Court notes that Defendant has not argued that Instruction No. 17 is an incorrect statement of law.

The Court has already discussed the fact that there was sufficient evidence to support the jury's findings of liability.

The Motion also identifies the lack of evidence to support the damage awards as an issue Defendants wish to raise. However, Defendants' Suggestions in Support (Doc. #181) fails to raise any arguments relevant to the damage calculation. Consequently, Defendants have not presented anything for the Court to review.

III. CONCLUSION

For the foregoing reasons, Defendant's Renewed Motion for Judgment as a Matter of Law, or, in the Alternative for New Trial is granted in part and denied in part. The award of punitive damages is vacated; the Motion is denied in all other respects.

IT IS SO ORDERED.

s/Ortrie D. Smith

ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

DATE: 10/28/99

APPENDIX C

[File-Stamp Omitted]

UNITED STATE DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

JEFFREY GORMAN, Plaintiff,

v.

RICHARD EASLEY, et al., Defendants.

** 2nd AMENDED **
JUDGMENT IN A CIVIL CASE

CASE NUMBER: 95-0475-CV-W-3

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED on the discrimination claim of plaintiff Jeffrey Gorman against defendants in their official capacities as members of the Board of Police Commissioners of Kansas City, Missouri as submitted in Instruction No. 16, we find in favor of Plaintiff Jeffrey Gorman. We find Plaintiff Jeffrey Gorman's damages as defined in Instructio[n] No. 18 to be: $1,034,817.33. We, the Jury, have awarded damages for each of the categories listed in Instruction No. 18 as set forth: $43,566. for wages; $150,000.00 for physical pain, suffering, humiliation, inconvenience or emotional anguish.

Defendant's Renewed Motion for Judgment as a Matter of Law, or, in the Alternative For New Trial is granted in part and

denied in part. The award of punitive damages is vacated; the Motion is denied in all other respects.

Plaintiff's Motion for an award of attorney fees and costs is granted in part and denied in part. Defendants are ordered to pay Plaintiff's attorney fees in the amount of $278,292.00 and Plaintiff's costs in the amount of $11,621.40. In accordance with the parties' agreement on this matter, the award shall accrue interest at the post-judgment rate. *See* 28 U.S.C. § 1961.

November 5, 1999 — Patricia L. Brune

Date — *Clerk*

Entered on Nov 8 1999 — s/ E. Wells

(By) Deputy Clerk

APPENDIX D

United States Court of Appeals
for the Eighth Circuit

No. 97-4323

Jeffrey Gorman, Plaintiff-Appellant,

v.

Floyd Bartch; Steven Bishop, Chief, Kansas City Missouri Police Department; Emanuel Cleaver II; John Dillingham; Jack Headley; Jacqueline Paul; Bailus Tate; Donna Boley; Neil Becker; Stacey Daniels, Dr.; James F. Ralls, Jr., Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Missouri

Submitted: May 18, 1998

Decided: August 20, 1998

Before BEAM, LOKEN, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

Jeffrey Gorman, a paraplegic who uses a wheelchair, was injured while being transported after his arrest by Kansas City police officers. He brought this action against the members of the Kansas City Board of Police Commissioners, the chief of police, and the officer who drove the transport vehicle, claiming discrimination based on his disability in violation of Title II of the Americans With Disabilities Act (ADA), 42 U.S.C. § 12132, and § 504 of the Rehabilitation Act, 29 U.S.C. § 794(a).[1] The district court granted summary judgment to the defendants, and Gorman appeals from the judgment. We affirm in part and reverse in part.

I.

Each side characterizes the facts in the record quite differently, but on our de novo review of the grant of summary judgment, we state them in the light most favorable to Gorman, the non-moving party. *Gerdes* v. *Swift-Eckrich, Inc.*, 125 F.3d 634, 637 (8th Cir.1997). A severe spinal cord injury requires Gorman to use a wheelchair, and in the early hours of May 31, 1992 he became involved in a disagreement at a Kansas City bar known as Guitars and Cadillacs. When he and a friend began descending the steps to the dance floor, a bar employee told him he could not go down onto the dance floor. Gorman protested that he was entitled to go there, but the employee told him "you're out of here" and began to pull his wheelchair up the steps. Gorman was evicted from the bar. When he demanded to be readmitted, employees at the door refused. Gorman then approached two police officers to tell them what had happened and to request their help in getting back into the bar. He began to argue with them, and they eventually arrested him for

[1] He also alleged negligence, but his negligence claims were dismissed by the district court and he has not discussed them in his briefing or argument on appeal. They are therefore considered abandoned. *Jasperson* v. *Purolator Courier Co.*, 765 F.2d 736, 740-41 (8th Cir.1985).

trespassing and called for transportation to take him to the police station.

In response to the call officer Neil Becker arrived with a patrol wagon that was not equipped with a wheelchair lift or wheelchair restraints. Gorman told the police that the van was not properly equipped for him to ride in it, and that due to his use of a urine bag it would be necessary for him to go to the bathroom before he was transported. The officers lifted Gorman from his chair and placed him on a bench inside the van. Gorman states that they complied with his instructions on how to lift him from his chair, but not with his requests that he be allowed to go to the bathroom prior to transport or that they place the seat cushion from his wheelchair underneath him to help support his legs. Because of his paraplegia Gorman was not independently able to maintain himself upright on the bench, and the police tied him with his belt to a mesh wall behind the bench and also fastened a seatbelt around him. During the drive to the station the belts came loose, and Gorman fell to the floor. The fall injured his shoulders and back severely enough to require surgery and also broke his urine bag, leaving him soaked in his own urine.

Gorman filed this action, alleging violation of his rights under the ADA and the Rehabilitation Act and negligence in his handling. Gorman sued police chief Steven Bishop; commissioners Emmanuel Cleaver, John Dillingham, Jack Headley, Jacqueline Paul, and Bailus Tate; and police officer Neil Becker. Donna Boley, Stacy Daniels, and James Ralls were added when they replaced Paul, Dillingham, and Tate as members of the board of police commissioners, as was Floyd Bartch when he succeeded Bishop as chief of police. Gorman alleged that the board members and the chief failed to provide a proper transportation vehicle to accommodate his condition, to modify department policies and procedures dealing with arrest and transportation to accommodate individuals with spinal cord injuries, and to institute proper training for Kansas

City police officers on how to handle such arrestees. He claimed that the manner of his post-arrest handling and transportation evidenced unlawful discrimination by all the defendants, including Becker who drove the police van that took him to the station. His complaint sought compensatory damages for physical and mental injuries, punitive damages, injunctive relief compelling the defendants to comply with the statutes, and attorney fees and costs.

The defendants filed several motions in the district court, including motions for summary judgment, and the parties submitted affidavits and deposition testimony from Gorman, several defendants, and other witnesses. The district court disposed of the issues on summary judgment in two separate orders. The first order dismissed all the negligence claims;[2] dismissed all claims against the defendants in their individual capacities on the basis of qualified immunity; and dismissed all other claims against former commissioners Dillingham, Paul, and Tate, as well as former police chief Bishop.[3] The only claims which remained after the first order were therefore the statutory claims against the remaining defendants in their

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[2] The court held the negligence claims failed under Missouri law. It reasoned that the defendants in their individual capacities were engaged in discretionary acts and that the official capacity claims were barred by sovereign immunity because they did not fit statutory exceptions for negligent operation of a motor vehicle in the course of official duty or for maintaining dangerous conditions on public property. *See* Mo.Rev.Stat. § 537.600.

It is not clear from the complaint whether the claim for punitive damages was based only on negligence. This court has not addressed whether punitive damages are available under Title II of the ADA and § 504, but the Sixth Circuit has ruled they are not. *See Moreno* v. *Consolidated Rail Corp.*, 99 F.3d 782, 792 (6th Cir.1996).

[3] The order specified that Floyd Bartch would be substituted for Bishop as to any official capacity claims.

official capacities. The second order concluded that the two federal statutes did not cover Gorman's claims because he did not fit the ADA definition of a "qualified individual with a disability." Such a qualified individual must meet "the essential eligibility requirements for the receipt of services" of the public entity, and the court construed this statutory language to mean services voluntarily sought, which would not include those incident to an arrest. The court also reasoned that Congress had not shown it intended to extend the statute to a core state function such as police work, citing in support *Torcasio* v. *Murray*, 57 F.3d 1340 (4th Cir.1995) (qualified immunity for state prison officials sued under the ADA). A final judgment was not entered until after Gorman's initial attempt to appeal,[4] and the court's order for judgment added a citation to *Aswegan* v. *Bruhl*, 113 F.3d 109 (8th Cir.1997), *cert denied sub nom Aswegan* v. *Emmett*, 522 U.S. 956, 118 S.Ct. 383, 139 L.Ed.2d 299 (1997) (leaving open the question of whether the ADA applied to state prisons, but rejecting the claim that an individual cable television hookup in an infirmary cell was a public service to which the plaintiff was entitled where cable television was available in the infirmary recreation area adjacent to his cell).

On appeal Gorman argues that he is a qualified individual with a disability, that the statutes do not distinguish between public services that are voluntarily sought and those that are not, that transporting arrestees is a program or activity covered by the ADA and the Rehabilitation Act, that he was discriminated against by not receiving transportation that was safe in light of his disability, and that the defendants are not entitled to qualified immunity since the applicable law was clearly established at the time of his arrest and transportation.[5]

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[4] *See Gorman* v. *Bartch*, 123 F.3d 1126 (8th Cir.1997).

[5] The United States was initially permitted to intervene in the district court because of a constitutional challenge to Title II as void for

The police defendants argue in response that Gorman is not a qualified individual with a disability since he did not voluntarily seek police transportation, that such transportation is not a service or activity covered by the statutes, that Gorman was not discriminated against based on his disability, and that they are entitled to qualified immunity.

The task before this court then is essentially twofold: to determine (1) whether Gorman has presented claims cognizable under the ADA and the Rehabilitation Act, and (2) whether the defendants sued in their individual capacities are entitled to qualified immunity.

II.

Analysis of whether Gorman's allegations can be pursued under Title II of the ADA and § 504 of the Rehabilitation Act must begin with the language of the statutes themselves, *Watt* v. *Alaska*, 451 U.S. 259, 101 S.Ct. 1673, 1677, 68 L.Ed.2d 80 (1981), and their plain language must be given effect. *Connecticut National Bank* v. *Germain*, 503 U.S. 249, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992).

The Rehabilitation Act became effective in 1973, and § 504 of the act provides that "[n]o otherwise qualified individual with a disability" shall "be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). The reach of this statutory language is demonstrated by the definition of "program or

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vagueness, and it has filed an amicus brief on this appeal which argues that Title II of the ADA and § 504 of the Rehabilitation Act apply to all operations of a police department and to the type of allegations raised by Gorman. The district court's ruling upholding the constitutionality of the statute has not been appealed.

activity" to include "all of the operations of a department, agency, special purpose district, or other instrumentality of a State or of a local government." 29 U.S.C. § 794(b). To prevail on a claim under § 504, a plaintiff must demonstrate that: (1) he is a qualified individual with a disability; (2) he was denied the benefits of a program or activity of a public entity which receives federal funds,[6] and (3) he was discriminated against based on his disability. 29 U.S.C. § 794(a); *Layton* v. *Elder*, 143 F.3d 469, 472 (8th Cir.1998). Defendants may demonstrate as an affirmative defense that a requested accommodation would constitute an undue burden. 29 U.S.C. § 794a(a)(1); *Barth* v. *Gelb*, 2 F.3d 1180, 1183 (D.C.Cir.1993). Plaintiffs who prevail on Rehabilitation Act claims are entitled to the full spectrum of legal and equitable remedies needed to redress their injuries. *Lue* v. *Moore*, 43 F.3d 1203, 1205 (8th Cir.1994); *Rodgers* v. *Magnet Cove Public Schools*, 34 F.3d 642, 644 (8th Cir.1994).

The ADA consists of three titles addressing discrimination against the disabled in different contexts. Title I prohibits employment discrimination, 42 U.S.C. § 12112, Title II prohibits discrimination in the services of public entities, 42 U.S.C. § 12132, and Title III prohibits discrimination by public accommodations involved in interstate commerce such as hotels, restaurants, and privately operated transportation services, 42 U.S.C. §§ 12182, 12184. Title II took effect in January of 1992 and provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. A "qualified individual with a disability" is broadly defined as any person who "meets the essential eligibility requirements for the

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[6] No argument has been raised in this case that the Kansas City police department does not receive federal funds, and Bishop testified in his deposition that it did.

receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). The term "public entity" is defined to be "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1).

The ADA has no federal funding requirement, but it is otherwise similar in substance to the Rehabilitation Act, and "cases interpreting either are applicable and interchangeable." *Allison* v. *Department of Corrections*, 94 F.3d 494, 497 (8th Cir.1996). The statute itself states that "[t]he remedies, procedures, and rights" under § 504 are also available under Title II. 42 U.S.C. § 12133; *see also Layton*, 143 F.3d at 472; *Hoekstra* v. *Independent School Dist. No. 283*, 103 F.3d 624, 626-27 (8th Cir.1996). A plaintiff under Title II of the ADA must therefore similarly show that he is a qualified individual with a disability denied participation in, or the benefits of, the services, programs, or activities of a public entity because of his disability. *Layton*, 143 F.3d at 472. The defendants may also raise as an affirmative defense that the requested accommodation of the plaintiff's disability would constitute an undue burden, requiring "a fundamental alteration in the nature of a service, program, or activity or in undue financial or administrative burdens." *See* 28 C.F.R. § 35.150(a)(3).

Our task in considering whether Gorman's allegations come under the ambit of the federal statutes has been made easier by the Supreme Court's unanimous decision on June 15 in *Pennsylvania Department of Corrections* v. *Yeskey*, 524U.S. 206, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998). In applying Title II of the ADA to state prisons and prison services, Justice Scalia emphasized the broad language used by Congress and its choice not to include exceptions. *Id.* 524 U.S. at ----, 118 S.Ct. at 1954. State prisons "fall squarely within the statutory definition of 'public entity'" since § 12131(1)(B) defines public entity as "any department, agency, special purpose district, or other instrumentality of a State or States or local government." *Id.*

524 U.S. at ----, 118 S.Ct. at 1954-55. The Court categorically rejected the argument that the statutory prohibition against excluding a qualified individual with a disability from participating in or receiving the "benefits of the services, programs, or activities of a public entity" does not apply to prison services because they do not fit the common understanding of "benefits" or "services," for "[t]he text of the ADA provides no basis for distinguishing these programs, services, and activities." *Id.* 524 U.S. at ----, 118 S.Ct. at 1955.

Application of *Yeskey* to the claims in this case shows that they also fit under the ADA. A local police department falls "squarely within the statutory definition of 'public entity,'" *Id.* 524 U.S. at ----, 118 S.Ct. at 1954, just like a state prison. The fact that Gorman may not have "volunteered" to be arrested does not mean he was not eligible to receive transportation service to the police station. Covered programs or services do not need to be voluntary, for "the words [of the statute] do not connote voluntariness." *Id.* 524 U.S. at ----, 118 S.Ct. at 1955. A qualified individual may participate in a service on either a voluntary or a mandatory basis, as illustrated by Justice Scalia's example of a drug addict required to participate in a treatment program. *Id.* Transportation of an arrestee to the station house is thus a service of the police within the meaning of the ADA. The fact that the statute can be "applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Id.* 524 U.S. at ----, 118 S.Ct. at 1956 (internal citations omitted). It was therefore error to conclude that Gorman was not a "qualified individual with a disability" who "meets the essential eligibility requirements for the receipt of services."[7] 42 U.S.C. § 12131.

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[7] *Yeskey* also undercuts the point made by the district court in reliance on *Torcasio* that the ADA does not indicate that it applies to core state functions such as prisons. Justice Scalia emphasized that the statutory language "plainly covers state institutions *without* any exception that could cast the coverage of prisons into doubt." *Yeskey*, 524 U.S. at ----,

The stated purpose of the ADA also demonstrates its applicability to transportation of arrestees. In the statement of findings and purpose at the beginning of the statute, Congress noted that "discrimination against individuals with disabilities persists in such critical areas as ... transportation ... institutionalization ... and access to public services" and that disabled individuals face the discriminatory effects of "failure to make modifications to existing facilities and practices." 42 U.S.C. 12101(a). Congress enacted the ADA to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b).

The regulations promulgated to guide implementation of the statute are also instructive. The Department of Justice specified that the statutory term "program" includes "the operations of the agency or organizational unit of government receiving or substantially benefitting from the Federal assistance awarded, e.g., a police department or department of corrections." 28 C.F.R. § 42.540. The regulations also indicate that "benefit" includes "provision of services, financial aid, or disposition (i.e., handling, decision, sentencing, confinement, or other prescription of conduct)." *Id.* The commentary also made clear that "[t]he general regulatory obligation to modify policies, practices, or procedures requires law enforcement to make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities." 28 C.F.R. § 35, App. A, Subpart B.

Gorman's allegations that the defendants denied him the benefit of post-arrest transportation appropriate in light of his disability fall within the framework of both Title II of the ADA and § 504 of the Rehabilitation Act. The defendants are representatives of the Kansas City police establishment, a department of local government and a public entity. Arrestee

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118 S.Ct. at 1954 (emphasis in original).

transportation is a program or service of the department as shown by record evidence that vehicles are dispatched by the department to transport arrestees. The statutes must be interpreted broadly to include the ordinary operations of a public entity in order to carry out the purpose of prohibiting discrimination. *Innovative Health Systems* v. *City of White Plains*, 117 F.3d 37, 44-45 (2nd Cir.1997). The "benefit" Gorman sought in this case was to be handled and transported in a safe and appropriate manner consistent with his disability. *See* 28 C.F.R. § 35.130(b)(1) (public entity may not provide services in a manner denying disabled individuals equal benefit of the service). His allegations are different from cases in which plaintiffs sought unique benefits or services. *See e.g., Aswegan*, 113 F.3d at 110; *Lue* v. *Moore*, 43 F.3d 1203, 1206 (8th Cir.1994) (Rehabilitation Act did not require creation of new prison vocational training program).

Because Gorman's allegations pass the threshold required to bring a case under the ADA and the Rehabilitation Act, the district court's ruling to the contrary must be reversed and the case remanded for further proceedings. It remains to be determined whether Gorman can prove he was discriminated against or denied a benefit or service because of his disability or whether the defendants can show they made reasonable accommodations of his disability or if further accommodation would have been an undue burden. 29 U.S.C. § 794a(a)(1); 42 U.S.C. § 12133. The facts of what actually occurred on the night of the arrest are contested. The defendants dispute Gorman's version. They have produced evidence that he was intoxicated, that he repeatedly wheeled his chair into the street and yelled profanities, that he did not tell the police how to transport him safely, and that he fell to the floor of the van because he released his seatbelt. We resolve only the threshold issue at this time, and we are not in a position to assess what the evidence shows about relevant details of Gorman's condition or about the information and options available to the police. The factual record will need to be further developed on remand

before the remaining issues of potential liability and possible relief are determined.

III.

Gorman also challenges the district court's determination that the defendants are entitled to qualified immunity in their individual capacities. The district court granted summary judgment on the claims against the defendants in their individual capacities based on its conclusion that the applicability of Title II of the ADA and § 504 of the Rehabilitation Act to the transportation of an arrestee was not clearly established at the time of Gorman's arrest. Gorman concedes on appeal that defendants Bartch, Boley, Daniels, and Ralls are not subject to liability in their individual capacities because they assumed their positions after the events giving rise to his claims and they were therefore sued only in their official capacities. He argues that the district court erred in dismissing the individual capacity claims against the remaining defendants, however, because the applicability of the statutes to his transportation was clearly established. The defendants argue in response that their conduct did not violate clearly established rights under the statutes.[8] We review de novo the decision granting qualified immunity. *Rowe* v. *Lamb*, 130 F.3d 812, 814 (8th Cir.1997).

Claims against government actors in their individual capacities differ from those in their official capacities as to the type of conduct that is actionable and as to the type of defense that is available. *See Hafer* v. *Melo*, 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991). Claims against individuals in their official capacities are equivalent to claims against the entity for

[8] Since the defendants did not appeal the district court's conclusion that they were sued in both their official and individual capacities, they have waived any argument about the correctness of that determination. *In re Sherman*, 67 F.3d 1348, 1357 n. 10 (8th Cir.1995).

which they work; they require proof that a policy or custom of the entity violated the plaintiff's rights, and the only type of immunity available is one belonging to the entity itself. *Id.*, 502 U.S. at 24-27, 112 S.Ct. at 361-62 (1991). Personal capacity claims, on the other hand, are those which allege personal liability for individual actions by officials in the course of their duties; these claims do not require proof of any policy and qualified immunity may be raised as a defense. *Id.*, 502 U.S. at 25-27, 112 S.Ct. at 362.

The defense of qualified immunity gives government officials engaged in discretionary activities immunity from liability unless their conduct violates "clearly established statutory or constitutional rights." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). The availability of the defense should ordinarily be resolved at the earliest opportunity to avoid unnecessary cost and excessive interference with government operations. *Id.* Whether the controlling legal principle has been clearly established is not to be determined at the most general level of legal abstraction, but by consideration of whether a reasonable official would have known the conduct in question was unlawful in light of information available at the time. *Anderson* v. *Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 3039-40, 97 L.Ed.2d 523 (1987).

The factual record before the court on the summary judgment motion based on qualified immunity consisted of affidavits and portions of depositions. Commissioner Dillingham testified in his deposition that shortly after the ADA was passed, the commissioners were notified by a police department representative that the law had been enacted and that it might apply to the operations of the department. He did not recall any formal discussion of the impact of the law on department operations, however, or of any perceived need for an official policy to ensure compliance with the law or information about how other police departments were responding. Dillingham testified that the commissioners relied on the

department to develop procedures to comply with the new law and that board minutes would have disclosed if there had been discussion of the ADA or any policy under it. Commissioner Headley testified that when the board was informed of a new law by its legal department, it would commonly wait for appropriate procedures to be developed by the police department; the board's role was to review and approve policy. Suzanne Owen, an assistant to the board, reviewed minutes of the meetings prior to Gorman's arrest and found no discussion about the design or provision of patrol wagons.

Chief Steven Bishop stated in his deposition that he had been aware of the existence of the ADA, but that he was not familiar with the Rehabilitation Act and that he did not know the effective date of either statute. While department officials had attended some training sessions on the ADA, he had delegated responsibility for developing department procedures to comply with the law to a deputy chief and he was not aware of any training that had been conducted for rank and file police officers. Major Dean Kelly, the director of personnel, testified that in September of 1991 a committee had been created which made a series of recommendations on how to achieve compliance with the ADA. These recommendations dealt primarily with reconfiguring department job descriptions and other employment issues, however, and Kelly was not aware of any dealing with arrest and transportation procedures. Commander Thomas Daly of the planning and research division testified that the department had conducted training on how to handle wheelchairs, but that he did not recall when. Officers are trained to handle arrestees "in whatever state we find them," but Daly was not aware of any specific written policies on handling arrestees in wheelchairs or any meetings discussing the applicability of the ADA to arrest and transportation. Pete Richardson, manager of fleet operations for the department, testified that none of its vehicles had been equipped to handle wheelchairs at the time of Gorman's arrest, but that they have all since been fitted with "hold downs" which permit a

wheelchair to be transported without removing the arrestee from the chair.

Officer Neil Becker testified in his deposition that he had been a patrol officer with the department for over twenty years and that he had received no special training to operate a patrol wagon. Any officer could be assigned to drive one during a particular shift. He recalled that he and the other officers on the scene asked Gorman some questions about the logistics of transporting him, but he did not remember exactly what Gorman said he needed or whether he asked to have his seat cushion under him for support. He did not recall receiving any training prior to Gorman's arrest on compliance with the ADA or handling arrestees with spinal cord injuries and was not aware of any department policies or procedures for the handling of arrestees with disabilities.

At the time of Gorman's arrest in May of 1992, Title II of the ADA had only been in effect for some four months. Despite the clear language of the statute, there was uncertainty about the extent of its coverage. There were no cases addressing its possible application to government agencies like police departments or to the transportation of arrestees. Although there were some cases applying the Rehabilitation Act to prisons, there were none dealing with facts similar to those alleged by Gorman. *See Harris* v. *Thigpen*, 941 F.2d 1495 (11th Cir.1991) (HIV positive inmates seeking access to prison programs); *Bonner* v. *Lewis*, 857 F.2d 559 (9th Cir.1988) (prisoner's claim for qualified interpreter in disciplinary hearings). In the intervening years until the Supreme Court decided *Yeskey*, courts divided on the applicability of the ADA and Rehabilitation Act to state prisons. Compare *Yeskey* v. *Commonwealth of Pennsylvania Dept. of Corrections*, 118 F.3d 168 (3rd Cir.1997) (participation in prison boot camp program covered), *Crawford* v. *Indiana Dept. of Corrections*, 115 F.3d 481 (7th Cir.1997) (blind inmate's access to prison education and recreation programs covered), *with White* v. *Colorado*, 82

F.3d 364 (10th Cir.1996) (denial of surgery for prisoner's preexisting injury not covered), *Torcasio*, 57 F.3d 1340 (4th Cir.1995) (application to obese prisoner's claim for larger cell and alternative recreation not clearly established). Moreover, much of the early attention to the ADA was focused on employment and physical access issues.

Under the circumstances it cannot be said that reasonable police officials in May of 1992 would have known that the actions alleged against the individual defendants in respect to the transportation of a disabled arrestee were subject to, and in violation of, Title II of the ADA or § 504 of the Rehabilitation Act. The defendants are therefore entitled to qualified immunity in their individual capacities, and we affirm that ruling by the district court.

IV.

The district court ultimately dismissed all of Gorman's claims for damages and injunctive relief by concluding that his claims against the defendants in their official capacities could not go forward since the statutes did not apply to arrestee transportation by a police department. As already discussed, Gorman's complaint passes the statutory threshold under *Yeskey* and the claims against the defendants in their official capacities must be remanded for further development. It remains to be seen whether he can show he was discriminated against or denied a benefit because of his disability or that the defendants had a policy or custom that violated his rights under the ADA or the Rehabilitation Act, and the defendants can also raise issues of reasonable accommodation and undue burden.

The judgment dismissing all claims is vacated, and the conclusion of the district court that the ADA and the Rehabilitation Act do not cover Gorman's allegations is reversed. We affirm the dismissal of the claims against the defendants in their individual capacities on the basis of qualified

immunity, and remand the official capacity claims against Bartch, Cleaver, Headley, Boley, Daniels, Ralls, and Becker[9] for further proceedings not inconsistent with this opinion.

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[9] Officer Becker is not alleged to have had any policy making function, and it is unclear what liability he might have in his official capacity, but the district court indicated that he was also sued in this capacity, and he has not appealed this determination.

APPENDIX E

United States Court of Appeals
for the Eighth Circuit

No. 00-1029/00-1030

Jeffrey GORMAN, Appellant/Cross-appellee,

v.

Richard EASLEY, et al., Appellees/Cross-appellants.

Order Denying Petition for Rehearing
and Rehearing En Banc

August 20, 2001

The petition for rehearing en banc is denied. Judge Bowman and Judge Loken would grant the petition.

The petition for rehearing by the panel is also denied.

APPENDIX F

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), as amended, provides in pertinent part:

> No otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance * * * .

Section 505 of the Rehabilitation Act, as amended in 1978, 29 U.S.C. § 794a, provides in relevant part (29 U.S.C. § 794a(a)(2)):

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

Section 202 of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, provides in full:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Section 203 of the ADA, 42 U.S.C. § 12133, provides in full:

> The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and

rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, provides in full:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681(a), provides in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * * .

The Civil Rights Act of 1991, 42 U.S.C. § 1981a, provides in pertinent part:

> (a) Right of recovery
>
> * * *
>
> (2) Disability
>
> In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of Title 29, respectively) against a respondent who engaged

> in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of Title 29 and the regulations implementing section 791 of Title 29, or who violated the requirements of section 791 of Title 29 or the regulations implementing section 791 of Title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.
>
> * * *
>
> (b) Compensatory and punitive damages
>
> (1) Determination of punitive damages
>
> A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.
>
> * * *
>
> (3) Limitations
>
> The sum of the amount of compensatory damages awarded under this section for future pecuniary losses,

emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party--

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.